Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DAN WILLBANKS,
PETITIONER

V.

JIM E. CROTTS
JOHN KECK
ALAMO RANCH CO.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO DIV. 2 OF THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Dan Willbanks
5158 W. Buford Ln.
McNeal, AZ 85617
(520) 642-3746

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606 pgs

QUESTIONS PRESENTED FOR REVIEW

1. Does the Arizona Farm Protection Act (A.R.S. Sec. 3-112) conflict with the provisions of the 5th and 14th Amendments to the U. S. Constitution when used in Tort Actions for Damages based on private nuisance between strictly private parties?

2. Was this petitioner effectively denied a jury trial to determine liability and damages for annoyance, inconvenience, and discomfort of his home, in violation of the 7th and 14th Amendments to the U.S. Constitution?

3. Have the respondents been given a "noise easement", under color of state law, in violation of the 5th and 14th amendments to the U.S. Constitution?

4. Would the due process clause of the 14th Amendment be violated by:
   (1) Judge Brown's refusal to honor timely filed Notices of Change of Judge, without hearing;
   (2) The imposition of heavy sanctions (payable to the court to be later disposed of by Judge Brown), immediately after the filing of Notice of Change of Judge, without hearing?

5. Would the equal protection clause of the 14th Amendment be violated by the granting of costs and attorney fees since the Arizona courts have constantly held that, in tort actions, costs and fees are not available?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of Div. 2 of Arizona Court of Appeals is a "memorandum" unreported decision and is reprinted in the appendix hereto ("App.") at page 1a. The order of Div. 2 of the Az. Ct. App. denying reconsideration is reprinted at App. page 13a. The order of the Arizona Supreme Court denying the petition for review is reprinted at App. page 15a. The Superior Court's "Findings of Fact & Conclusions of Law" is reprinted at App. page 17a.

JURISDICTION

The decision of Div. 2 of the Arizona Court of Appeals was entered on September 28, 1995. (App. 1a) The order of Div. 2 of the Az. Ct. of App. denying reconsideration was filed on October 20, 1995, (App. page 13a). The order of the Supreme Court of Arizona denying petition for review was filed on April 25, 1996, (App. page 15a). The findings of fact and conclusion of law by the Superior Court was filed December 8, 1994, (App. page 17a). The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257. 28 U.S.C. Sec. 2403(b) may apply and the notifications required by Rule 29.4(C) have been made.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

(1) Amendment 1 (2) Amendment 5
(3) Amendment 7 (4) Amendment 14

ARIZONA CONSTITUTION

(1) Article 2, Sections 3, 4, 5, 9, 13, 17, 23. (2) Article 4, part 2, Section 19, sub-sections 6 & 13. (3) Article 6, Sections 17 & 21.

STATUTES

(1) 28U.S.C. Sec. 1257 (2) A.R.S. Sec. 3-112. (3) A.R.S. Sec. 12-409. (4) A.R.S. Sec. 12-410. (5) A.R.S. Sec. 2917(A).

RULES

Rule 42, Az. R. Civ. P.; and Rule 13 of the Uniform Rules of Practice for the Superior Courts of Arizona.

STATEMENT OF THE CASE

1. Petitioner and wife acquired their property, in joint tenancy, on October 23, 1972.
2. In May 1983, petitioner quit-claimed his interest in the property to his wife, Fay C. Willbanks.
3. Respondents acquired their adjacent property on December 29, 1976.
4. On respondent's property, there is an irrigation well and pump which is powered by an internal combustion engine fueled by natural gas.
5. In either February or March of 1974, a six-cylinder Caterpillar engine was installed, by a previous owner, at the irrigation well.
6. This Caterpillar engine was operated, without mufflers, until May 1992.
7. In May 1992, a V-8 Teco engine was installed on respondent's irrigation well.
8. This Teco engine was operated for 12

days (24 hours a day) without mufflers, during which time petitioner complained, by telephone, to the parties involved in the installation of this engine, about the noise emitted by this Teco engine. Petitioner was informed that mufflers would be installed.

9. After this Teco engine had been operated for 12 days (24 hours a day) without mufflers, two inadequate mufflers were installed on this Teco engine.

10. On June 1, 1992, petitioner mailed a letter of "Notice and Demand" to respondents warning that if the noise was not abated, petitioner would sue.

11. The noise continuing, on July 6, 1992, petitioner filed his first Tort Action (CV 92-07-00375) for damages, alleging nuisance.

12. The noise continuing, on October 2, 1992, petitioner filed an Action in Equity for an injunction (CV 92-10-00510), asking the court to abate this noise.

13. By minute entry (Without hearing) dated October 6, 1992, Judge James L. Riley dismissed petitioner's first Tort Action.

14. In a hearing on November 9, 1992, Judge Riley entered a judgement dismissing CV 92-07-00375, granting summary judgement, and awarding costs and fees of over $4,000.00 against petitioner.

15. On November 30, 1992, petitioner filed a Notice of Appeal.

16. The noise continuing, on March 9, 1993, petitioner filed his second Tort Action for Damages (CV 93-03-00097) alleging nuisance.

17. The noise continuing, on May 5, 1993, petitioner filed his third Tort

Action for Damages (CV 93-05-00206) for nuisance.

18. On June 4, 1993, petitioner filed a "Complaint for an Immediate Injunction" (CV 93-06-00248) asking the court to stop a dog, domiciled on respondent's property from further trespassing and damaging small trees petitioner had planted.

19. The noise continuing, on July 6, 1993, petitioner filed his fourth Tort Action for Damages (CV 93-07-00318) alleging (1) Nuisance, (2) Illegal conversion of private property, (3) Illegally taking and damaging private property for private use without just compensation having first been made.

20. The noise continuing, on August 4, 1993, petitioner filed his fifth Tort Action for Damages (CV 93-08-00443) alleging (1) Nuisance, (2) Illegal conversion of private property, (3) Illegally taking and damaging private property for private use without just compensation having first been made.

21. On August 9, 1993, Judge Riley laid down the "law of the case"; consolidating CV 93-03-00097, CV 93-05-00206, CV 93-06-00248, and CV 93-07-00318 into CV 92-10-00510; ruled that petitioner could not have a "legal" jury trial, but only an equitable advisory jury trial; ordering the Clerk of the Court not to accept for filing anymore of the petitioner's complaints without Judge Riley's permission.

22. On August 17, 1993, Div. 2 of the Ariz. Court of Appeals remanded petitioner's first Tort Action (CV 92-07-00375) back to the Superior Court.

23. On August 23, 1993, petitioner filed a "Special Action" in Div. 2 of the Arizona Court of Appeals,

challenging Judge Riley's rulings of August 9, 1993.

24. Both the Court of Appeals and the Arizona Supreme Court refused jurisdiction of petitioner's special action. Petitioner had based his special action on an unsigned minute entry.

25. On August 24, 1993, petitioner filed a notice of Change of Judge as of right pursuant to Rule 42(f)(1)(a) of the Ariz. Rules of Civil Procedure, against Judge Riley, in case # CV 92-07-00375 only.

26. In September 1993, respondents installed a third muffler on the Teco engine which did substantially reduce the exhaust noise but did nothing to contain the mechanical noise of the engine and pumphead.

27. By minute entry dated September 15, 1993, Judge Riley (after noting that a notice of change of judge had been filed in CV 92-07-00375) attempted to consolidate the previously consolidated cases into CV 92-07-00375 and transferred the cases to the Court Administrators to be assigned to another judge.

28. On October 1, 1993, cases numbered CV 92-07-00375; CV 92-10-00510; CV 93-03-00097; CV 93-05-00206; CV 93-06-00248; and CV 93-07-00318 were reassigned to Judge Michael J. Brown of Pima County.

29. On October 19, 1993 Case # CV 93-08-00443 was reassigned to Judge Brown.

30. On October 7, 1993, petitioner presented another successive Action for Damages for the time period of August 9, 1993, through September 15, 1993, to the Clerk of the Court. The clerk refused to file petitioner's complaint.

31. On January 18, 1994, petitioner filed a "Motion to Vacate the Orders of Div. 3 of the Superior Court of Cochise County dated August 9, 1993, and September 15, 1993". (These were the orders issued by Judge Riley concerning consolidation, jury trial and further access to the courts). This motion was never heard, and Judge Brown later imposed sanctions of $500.00 on petitioner for filing the motion.

32. On February 4, 1994, petitioner filed in U.S. District Court (# CIV 94-93 TUC.ACM) a Tort Action for Damage pursuant to 42 U.S.C. 1983 ET SEQ. against Judge Riley, the Deputy Clerk of the Court, respondents and respondent's lawyers alleging deprivation of constitutional rights under color of state law. (The District Court dismissed; the Court of Appeals affirmed on the grounds of "immunity").

33. By minute entry (without hearing) dated March 7, 1994, Judge Brown set a jury trial date of December 6, 1994, in case # CV 93-08-00443 only.

34. By minute entry (without hearing) dated March 16, 1994, Judge Brown ordered that CV 93-08-00443 be consolidated into CV 92-07-00375.

35. Judge Brown having refused to hear any of the motions pending when the cases were assigned to him, and refusing to hear any of the motions filed after the cases were assigned to him; on October 7, 1994, petitioner filed a Notice of Change of Judge as of right pursuant to rule 42 (f)(1) in case # CV 92-10-00510, and a Notice of Change of Judge for cause pursuant to A.R.S. Sec. 12-409 (& Rule 42 (f)(2)) in case # 92-07-00375.

36. By minute entry (without hearing)

dated November 3, 1994, Judge Brown refused to honor the Notices of Change of Judge (declaring them to be untimely) and imposed sanctions of $3,000.00 on petitioner, payable to the court to be later disposed of by Judge Brown.

37. On November 14, 1994, petitioner filed an "Objection To and Exception To", Judge Brown's ruling dated November 3, 1994, - "and Request for Consideration" and asked for oral argument.

38. By minute entry (without hearing) dated December 2, 1994 (received by the Clerk of the Court and petitioner on Dec. 5, 1994) Judge Brown denied petitioner's Motion for Reconsideration and stating "the Notices of Change of Judge were without merit and are without merit"; and ordering that CV 92-10-00510 be consolidated into CV 92-07-00375.

39. A jury trial before an equitable advisory jury was had on December 6th and 7th, 1994. The jury instructions are in the accompanying appendix.

40. By minute entry of "Findings of Fact and Conclusions of Law" dated Dec. 8, 1994, Judge Brown denied equitable relief to this petitioner based on the doctrine of "Coming to the Nuisance".

41. By minute entry dated December 15, 1994, Judge Brown enjoined petitioner from filing any further suits or litigation against respondents.

42. By minute entry dated February 6, 1995, Judge Brown entered judgement regarding the jury trial; assessing jury fees of $1,268.78 against petitioner.

43. By minute entry dated February 3, 1995, Judge Brown ordered respondents to file a separate affidavit of taxable costs.

44. By minute entry dated April 5,

1995, Judge Brown "ordered that the defendants have judgement against the plaintiff for attorney fees in the amount or $25,107.00 in addition to the judgement for costs entered earlier in the amount of $341.00.

45. Petitioner filed his Notice of Appeal on March 6, 1995, to Div. 2 of the Ariz. Court of Appeals.

46. By memorandum decision filed September 28, 1995, Div 2 affirmed and awarded appeal costs and fees to respondents.

47. On October 5, 1995, petitioner filed a Motion for Reconsideration in Div. 2 of the Ariz. Court of Appeals.

48. On October 20, 1995, Div. 2 denied petitioner's Motion for Reconsideration.

49. On October 31, 1995, petitioner filed a "Petition for Review by Supreme Court of Arizona".

50. The Supreme Court of Arizona, April 23, 1996, denied petitioner's petition for review.

51. The noise is admitted by the respondents; noted by Judge Brown that it could be heard (even with the third muffler attached) in petitioner's bedroom and living room (in the middle of the day) over the noise of 8 jurors, the bailiff, a Deputy Sheriff, respondent's lawyer, and petitioner and wife. Testimony at the trial established that noise is louder at night than it is in the daytime.

52. The public is not privileged to enter either of the properties involved herein. The properties are not situated on a public road. There are no other disturbances (other than respondent's irrigation pump and engine) in this area.

53. Petitioner has not asked that the

farming operation be enjoined but only that the noise from respondent's engine and pump be contained to respondent's own land, and has continuously alleged that this can be done very easily and cheaply.

The requirements of Rule 14 (1)(g)(i) are met in the separate appendix filed herewith.

REASONS FOR GRANTING THE WRIT

This case presents straight-forward questions of law: **(1)** whether A.R.S. Sec. 3-112, when used in a case of private nuisance between strictly private parties, violates constitutional provisions and conflicts with previous decisions of this court. Sec. 3-112 was enacted in 1981 but there are no reported cases in Arizona. It seems that 48 states have "Farm Protection Acts" but there are few reported cases, and what few there are seem to go in different directions. **(2)** Was this petitioner effectively denied a jury trial on the legal issues and afforded only an advisory jury trial in a court of equity in violation of the 7th and 14th Amendments and in conflict with previous decisions of this court? **(3)** Was petitioner denied an honest, fair, and impartial trial before an honest, fair, and impartial tribunal in violation of "due process" and in conflict of previous decisions of this court? **(4)** Did the consolidation of successive actions (over the plaintiff's objections) filed in a case of a continuing abateable nuisance between strictly private parties violate "due process"; infringe upon the right to jury trial to determine liability and

damages; and conflict with previous decisions of this court? **(5)** Have the respondents been given a "noise easement" under color of state law, in violation of the 5th and 14th amendments, and in conflict with previous decisions of this court? **(6)** Would the due process clause of the 14th amendment be violated by Judge Brown's refusal to honor timely-filed notices of Change of Judge, and the imposition of heavy sanctions immediately after the filing of Notices of Change of Judge, without hearing? **(7)** Would the equal protection clause of the 14th amendment be violated by the granting of attorney fees (not as sanctions, but as to the winning party) since the Arizona courts have consistently held that, in actions sounding in tort, attorney's fees are not available? **(8)** And finally, does this petitioner, under the facts of this case, have standing to sue (for himself) for annoyance, inconvenience, and disturbance of the peaceful and quiet use and enjoyment of his home, and the property he has a lawful right to use and enjoy? All of these questions are within the cognizance of this court. Petitioner believes that this court should grant this petition and settle these matters.

ARGUMENT ON FIRST QUESTION PRESENTED

1. In Finlay v. Finlay (Private Nuisance Action, 1993), 18 Kan. App. 2d 479, 856 P.2d 183 (construing a statute virtually identical to A.R.S. 3-112), held that farmers were protected from nuisance suits if the requirements of the act were met, and noted that 47 other states had enacted right to farm

statutes. In Cline v. Franklin Pork, Inc. (Feb. 8, 1985), 219 Neb. 234, 361 N.W. 2d 566, it was held that since there had been no change in the use of the land adjacent to the nuisance, the Farm Protection Act was negated. In Flansburgh v. Coffee (july 5, 1985), 220 Neb. 381, 370 N.W. 2d 127, the court held the same and noted that there had been a change in the use of the defendant's land negating the statute. Petitioner finds no reported cases, concerning A.R.S. 3-112, in Arizona. Since at least 48 states have a Farm Protection Act, and there does not seem to be uniform guidelines established by the states, this court must consider the limits of these acts.

2. Petitioner's actions alleged a private nuisance of a continuing, abatable, temporary character between strictly private parties. Sec 3-112 makes no distinction between public and private nuisance. See Smith v. Cahoon (1931), 283 U.S. 553, 75 L. Ed. 1264, 51 S. Ct. 582. Therefore, Sec. 3-112 is unconstitutionally vague. See Cramp v. Bd. of Pub. Instruction (1961), 368 U.S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275. and Sec. 3-112 must be strictly construed. See Varjabedian v. City of Madera (1977), 142, Cal. Rptr. 429, 572 P.2d 43.

3. Nuisance is defined in A.R.S. Sec. 13-2917(a) and the conditions for its being a public nuisance is there defined. The conditions for its being a private nuisance is spelled out in City of Phoenix v. Johnson (1938), 51 Ariz. 115, 75 P. 2d 30; and Spur Industries, Inc. v. Del E. Webb Development Co. (1972), 108 Ariz. 178, 494 P. 2d 700.

4. It has long been settled, by this

court, that a private nuisance cannot be immunized from a private suit for damages. See Baltimore & Potomac R.R. Co. v. Fifth Baptist Church (1883), 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739; and Richards v. Washington Terminal Co. (1914), 233 U.S. 546, 58 L. Ed. 1088, 34 S. Ct. 654. See also Northwestern Fertilizer Co. v. Hyde Park (1878), 97 U.S. (7 Otto.) 659, 24 L. Ed. 1036.

5. It is settled that private property cannot be taken by the state for another's private use. See Thompson v. Consolidated Utilities Corp. (1937), 300 U.S. 55, 81 L. Ed. 510, 57 S. Ct. 364, and Hawaii Housing Authority v. Midkiff (1984), 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321.

6. The right to the peaceful and quiet use and enjoyment of property is, itself, property (see in Re Forstrom (1934), 44 Ariz. 472, 38 P. 2d 878; Hoffman v. Kinealy (Mo. S. Ct. 1965), 389 S.W. 2d 745) and is protected by our constitutions (See Shelley v. Kraemer (1948), 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161; U.S. v. General Motors Corp. (1945), 323 U.S. 373, 89 L. Ed. 311, 65 S. Ct. 357; Pruneyard Shopping Center v. Robins (1980), 447 U.S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035), just as the "Right to Exclude Others" was protected by this court in Kaiser Aetna v. U.S. (1979) 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383; Nollan v. Cal. Coastal Com'n. (1987), 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 314; and Dolan v. City of Tigard (1994), #93-518, 114 S. Ct. 2309. Does the right to exclude others include the right to exclude the annoying noise of others?

7. Div. 2 of the Arizona Court of Appeals held that Sec. 3-112 merely

created a "rebuttable presumption". This might be true in the case of a public nuisance (which can have an "adverse effect on the public's health and safety"), but it cannot be applied to a private nuisance which cannot (by the very definition of private nuisance have an "adverse effect on the public health and safety"), else it would not be a private nuisance; it would be a public one. Sec. 3-112 creates an arbitrary presumption, in a case of private nuisance, that cannot be rebutted. See Western and A. R. R. v. Henderson (1929), 279 U.S. 639, 73 L. Ed. 884, 49 S. Ct. 445.

8. Since the state has not paid "just compensation" for the property it has taken and given to the farmers; and since Sec. 3-112 does not authorize compensation; Sec. 3-112 is in violation of the 5th and 14th amendments to the Federal Constitution, and Art. 2 Sec. 4 & 17 of the State Constitution. See Hughes v. Washington (1967), 389 U.S. 290, 88 S. Ct. 438, 19 L. Ed. 2d 530. Even temporary takings must be compensated. See First English Evan. Luth. Church v. L.A. County (1987), 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct 2378.

9. Also, Sec. 3-112 is a "special" law and unconstitutional under the 14th amendment; Art. 2, Secs. 9 & 13, and Art. 4, Part 2, Sec. 19, Subsection 13 of the Arizona Constitution. It protects only farmers at the expense of individuals who are not farmers and who live adjacent to farmers. See Arizona Downs v. Arizona Horseman's Foundation (1981), 130 Ariz. 550, 637 P. 2d 1053, and State v. Loughran (1985), 143 Ariz. 345, 693 P. 2d 1001.

ARGUMENT ON 2ND QUESTION PRESENTED

1. On August 9, 1993, Judge Riley consolidated all of petitioner's Tort Actions (that he had jurisdiction of) into petitioner's Action in Equity; ruled that petitioner could not have a jury trial to determine liability and damages, but only an equitable advisory jury which the court could ignore; ordered the Clerk of the Court not to file any more of the petitioner's successive actions unless pre-approved by the court; thereby laying down the "law of the case". Petitioner had requested a jury trial in each of his Tort Actions for damages; he had not requested a jury trial in his action of equity (neither had the defendants). See pages 21 and 37 of the reporter's transcript of August 9, 1993.

2. As for the right and necessity of filing successive actions in the case of a continuing, abatable nuisance, see Baltimore & Potomac R. Co. v. Fifth Baptist Church (1891), 137 U.S. 568, 11 S. Ct. 185, 34 L. Ed. 784; Reynolds Metal Co. v. Wand (9 Cir. 1962), 308 F. 2d 504; City of Phoenix v. Johnson (1938), 51 Ariz. 115, 75 P. 2d 30, City of Tucson v. Apache Motors (1952), 74 Ariz. 98, 245 P. 2d 255.

3. The State of Arizona has mandated that in a continuing, abatable nuisance, successive actions for successive injuries must be brought (City of Tucson v. Apache Motors, Supra.); therefore, under the due process clause of the 14th Amendment (and Art. 2, Sec. 4, and Art. 4 Part 2, Sec. 19, Subsec. 6, of the Az. Const.) Superior Court judges may not deny that right. See Boddie v.

Connecticut (1971), 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113. The Right of Access to the courts is also guaranteed by the First Amendment to the U.S. Constitution (& Art. 2, Sec. 5, and Art. 18, Sec. 6 of the Az. Const.). See Ca. Transport v. Trucking Unlimited (1972), 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642; Franks v. U.S. Fidelity & Guar. Co. (1985), 149 Ariz. 291, 718 P. 2d 193.

4. It is well-settled that a jury trial on the legal issues cannot be denied because equity has entered the case, or by the court's consideration of only the equitable issues. See Beacon Theatres, Inc. v. Westover (1959), 359 U.S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948; Dairy Queen, Inc. v. Wood (1962), 369 U.S. 469, 8 L. Ed. 2d 44, 82 S. Ct. 894, Ross v. Bernhard (1970), 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729; Paris-Phoenix Corp. v. Esper (1975), 112 Ariz. 320, 541 P. 2d 917. The Due Process Clause of the 14th Amendment would require the same procedure in the State Courts. The Ariz. Const. (Art. 2, Sec. 23, & Art. 6, Sec. 17) guarantees the right to jury trial. Also, when Arizona adopted the U. S. Constitution (Art. 2, Sec. 3 of the Az. Const), it adopted the entire constitution (including the 7th amendment) and the Federal Case Law concerning the Federal Constitution.

5. On December 7, 1994, Judge Brown instructed the jury that they could not consider the question of liability and damages. See reporter's transcript of Dec. 7, 1994, at page 39. Also, it is clear, from the instructions given, that the jury was "advisory" only, for equitable purposes.

ARGUMENT ON 3RD QUESTION PRESENTED

1. A private nuisance is tied to an interest in the use and enjoyment of property. See State of N.Y. v. Shore Realty Corp. (2nd Cir. 1985), 759 F. 2d 1032, and may constitute a taking of property. See Baltimore & Potomac R.R. Co. v. Fifth Baptist Church (1883), 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739; Richards v. Washington Terminal Co. (1914), 233 U.S. 546, 58 L. Ed. 1088, 34 S.Ct. 654; Thornburg v. Port of Portland (1962), 233 Or. 178, 376 P. 2d 100; Martin v. Port of Seattle (1964), 64 Wash. 2d 309, 391 P. 2d 540; City of Jacksonville v. Schumann (Fla. 1967), 199 S. 2d 727 (Cert. Den. 390 U.S. 981, 88 S. Ct. 1101, 19 L. Ed. 2d 1278); Johnson v. City of Greenville (1968), 222 Tenn. 260, 435 S. W. 2d 476; Aaron v. City of L.A. (1974), 40 C.A. 3rd 471, 115 Cal. Rptr. 162; Ky. & W. Va. power Co. v. Anderson (1941), 288 Ky. 501, 156 S.W. 2d 857.

2. When Judge Riley ordered the Clerk of the Court not to file anymore of petitioner's complaints; and Judge Brown issued his injunction ordering petitioner not to file any more complaints until impossible conditions were met, while, at the same time, permitting the respondents to continue to maintain their noise unabated, the State of Arizona, acting through it's judges, took a noise (or air) easement from this petitioner and gave it to the respondents, in violation of the 5th and 14th Amendments, and Art. 2, Secs. 4 & 17, and Art. 4, Part 2, Sec. 19, Subsec. 6, of the Arizona Constitution.

ARGUMENT ON 4TH QUESTION PRESENTED

1. On October 7, 1994, petitioner timely filed a Notice of Change of Judge as of right against Judge Brown pursuant to Rule 42(f)(1) of the Az. R. Civ. P. in Case #CV 92-10-00510; and an Affidavit of Change of Judge for cause pursuant to A.R.S. Sec. 12-409 (& see rule 42 (f)(2) ARCP) in Case #CV 92-07-00375. Although no reason is required to be given for timely filed Notices of Change of Judge, petitioner stated his reason; that Judge Brown had refused, for a period of one year,to hear motions pending when the cases were assigned to him, and had refused to hear motions filed after the cases were assigned to him. But see Art. 6, Sec. 21 of the Ariz. Const. and Rule 13 of the Uniform Rules of Practice for the Superior Courts of Arizona.

2. Under the provisions of A.R.S. Sec. 12-410, Judge Brown could not cite petitioner for contempt for filing the Motions of Change of Judge, so, by minute entry (no hearing) dated November 3, 1994, Judge Brown imposed sanctions of $3,000.00 (payable to the court to be later disposed of by Judge Brown) on petitioner. The Appeals Court held that petitioner had "waived" his right to a change of judge by going to trial. But, heavy sanctions had already been imposed; heavy sanctions were sure to follow a refusal to go to trial, and even "jail" for contempt of court. There was no voluntary "waiver". See Garrity v. N.J. (1967), 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616.

3. On November 14, 1994, petitioner filed an "Objection to and exception to", Judge Brown's ruling dated Nov. 3, 1994 - and requesting oral argument. By minute entry (without hearing) dated 12/2/94, Judge Brown denied petitioner's motion.

On Change of Judge, see:

1. Ross v. White (1935), 46 Ariz. 304, 50 P. 2d 12;
2. Mosher v. Wayland (1945), 62 Ariz. 498, 158 P. 2d 654;
3. Marsin v. Udall (1955), 78 Ariz. 309, 279 P. 2d 721;
4. Smith v. Rabb (1963), 95 Ariz. 49, 386 P. 2d 649;
5. State v. Carpenter (1965), 1 Ariz. App. 522, 405 P. 2d 460;
6. Edwards v. Superior Court (1967), 5 Ariz. App. 211, 424 P. 2d 859;
7. Truck Equip. Co. of Az. v. Vanlandingham (1968), 103 Ariz. 402, 4 442 P. 2d 849;
8. West v. Superior Court (1868), 104 Ariz. 1, 448 P. 2d 57;
9. Itasca State Bank v. Superior Court (1968), 8 Ariz. App. 279, 445 P. 2d 555;
10. State v. Garcia (1977), 114 Ariz. 317, 560 P. 2d 1224;
11. City of Sierra Vista v. Cochise Enterprises (1979), 128 Ariz. 467, 626 P. 2d 1099;
12. Tash v. Saunders (1987), 153 Ariz. 322,736 P. 2d 805;
13. Flagel v. S.W. Clinical Physiatrist (1988), 157 Ariz. 196, 755 P. 2d 1184;
14. Lewis v. Kelliher (1992), 171 Ariz. 228, 829 P. 2d 1274:
15. Zuniga v. Superior Court (1954), 77 Ariz. 222, 269 P. 2d 720;
16. Murray v. Thomas (1956), 80 Ariz. 378, 298 P. 2d 795;
17. Hendrickson v. Superior Court (1958), 85 Ariz. 10, 330 P. 2d 507;
18. State v. Neil (1967), 102 Ariz. 110, 425 P. 2d 842;
19. Del Castillo v. Wells (1974), 22 Ariz. App. 41, 523 P. 2d 92;

20. Huck v. Haralambie (1979), 122 Ariz. 63, 593 P. 2d 286;
21. Liston v. Butler (1966), 4 Ariz. App. 460, 421 P. 2d 542;
22. State v. Harwood (1974), 110 Ariz. 375, 519 P. 2d 177;
23. Itule v. Farley (1963), 94 Ariz. 242, 383 P. 2d 127;
24. Chalpin v. Mobile Gardens, Inc. (1972), 18 Ariz. App. 231, 501 P. 2d 407;
25. Hickox v. Superior Court (1973), 19 Ariz. App. 195, 505 P. 2d 1086;
26. Caruso v. Superior Court (1966), 100 Ariz. 167, 412 P. 2d 463;
27. Zoellner v. Zoellner (1967), 4 Ariz. App. 561, 442 P. 2d 392;
28. Spriggel v. County of Maricopa (1971), 15 Ariz. App. 162, 487 P. 2d 8;
29. Apache East, Inc. v. Means (1979), 124 Ariz. 11, 601 P. 2d 615;
30. Focal Point, Inc. v. Court of Appeals (1986), 149 Ariz. 128, 717 P.qd 432;
31. Rourk v. State (1991), 170 Ariz. 6, 821 P. 2d 273;
32. City of Tucson v. Wondergem (1966), 4 Ariz. App. 291, 419 P. 2d 552;
33. Lamb v. Superior Court (1980), 127 Ariz. 400, 621 P. 2d 906;
34. Hordyk v. Farley (1963), 94 Ariz. 189, 382 P. 2d 668;
35. Berger v. U.S. (1921), 255 U.S. 22, 65 L. Ed. 481, 41 S. Ct. 437;
36. Tumey v. Ohio, (1927), 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437;
37. In Re Murchinson (1955), 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623;
38. Ward v. Village of Monroeville (1972), 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80;
39. Aetna Life Ins. Co. v. Lavoie (1986), 475 U.S. 813, 89 L. Ed. 2d 823,

106 S. Ct. 1580:

40. Liljeberg v. Health Services Acquisition Corp. (1988), 486 U. S. 847, 100 L. Ed. 2d 855, 108 S. Ct. 2194.

4. In Ward v. Village of Monroeville, Ohio, Supra, the money was to be paid into the city's finances. This court reversed and remanded. Here, the sanctions ($3,000.00) were to be paid to the Clerk of the Court for later disposition by Judge Brown.

5. Concerning these sanctions (remember that Judge Brown refused to hear anything from Aug. 1, 1993, until the date of trial (Dec. 6, 1994); and the Appeals Court simply ignored the issue of sanctions and attorney fees), see **(1)** Holt v. Va. (1965), 381 U.S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290; **(2)** Groppi v. Leslie (1972), 404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632; **(3)** Goldberg v. Kelly (1970), 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287; **(4)** Brinkerhoff-Faris Trust & Savings Co. v. Hill (1930), 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107.

6. Punishment is punishment, no matter what form (sanctions or contempt of court) it takes. Punishment without hearing violates due process of law. When petitioner timely filed his Notices of Change of Judge on October 7, 1994, Judge Brown lost all jurisdiction to proceed further. Jurisdiction was gone. Therefore, all acts of Judge Brown, after October 7, 1994, are complete nullities.

7. The Court of Appeals stated that the Notice of Change of Judge for cause was based on events that occurred on March 7, 1994, and was untimely filed on October 7, 1994, under the Provisions of Rule 42(f)(2), Az. R. Civ. P. The only event

occurring on March 7, 1994, was Judge Brown's setting a jury trial date in Case # CV 93-08-00443.

8. Evidently, the Appeals Court did not even read petitioner's affidavit of Change for Cause. Also, it is settled law that a Rule of Procedure cannot be used to negate the statute (A.R.S. Sec. 12-409). See Hordyk v. Farley, Supra, and Marsin v. Udall, Supra. If a Rule of Procedure is used so as to deny a party a fair and impartial trial before a fair and impartial judge, it would violate the due process provisions of the 14th Amendment.

9. As the cases cited above show, the right to a change of judge is "waived" only when it is filed <u>after</u> the judge has heard evidence to be used at the trial. Here, at the time of filing the Notices of Change of Judge, Judge Brown had heard nothing. His refusal to hear anything was the main reason stated for filing the Notices of Change of Judge.

10. The Appeal Court held that petitioner had "waived" his Change of Judge as of right by going to trial. It is settled "consent" does not confer jurisdiction on a court. See City of Tucson v. Wondergem, Supra, and Lamb v. Superior Court, Supra. When the Notices of Change of Judge were timely filed, jurisdiction was gone; petitioner could not restore it.

11. The Appeals Court conveniently overlooked Rule 42(f)(2)(d): "Hearing and Assignment. The presiding judge shall forthwith provide for a hearing to determine the issues connected with the affidavit". The presiding judge of Cochise County is Matthew Boroweic. It would seem clear that the Due Process clause of the 14th Amendment has been

thrown in the trashcan.

ARGUMENT OF 5TH QUESTION PRESENTED

1. The law, in Arizona, does not allow the granting of attorney fees in actions sounding in tort, yet, Judge Brown awarded attorney fees of over $25,000.00 to the respondents, and the Court of Appeals simply ignored the issue. But see: **(1)** Sparks v. Republic National Life Ins. Co. (1982), 132 Ariz. 529, 647 P. 2d 1127; **(2)** Hoffman v. Greenberg (1988), 159 Az. 377, 767 P. 2d 735; **(3)** Fire Ins. Exchange v. Thunderbird Masonry (1993), 177 Ariz. 365, 868 P. 2d 948; **(4)** Smith v. American Exp. Travel Services (1994), 179 Ariz. 131, 876 P. 2d 1166; **(5)** Hughes v. Rowe (1980), 449 U.S. 5, 101 S. Ct. 173, 66 L. Ed. 2d 163; **(6)** City of Cleburne Tex. v. Cleburne Living Center (1985), 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313; **(7)** Spevack v. Klein (1967), 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574.

2. Petitioner requested a "reported" decision. The Appeals Court issued an unpublished memorandum decision which could not be used as a precedent in other cases. Petitioner understands why. It would seem clear that the Equal Protection clause of the 14th Amendment has been utterly trashed.

JURY INSTRUCTIONS

1. The objectionable jury instructions are reproduced in the separate Appendix filed herewith. These instructions make it clear that, not only was the jury an equitable "advisory" jury, but also that Judge Brown was so biased and prejudiced

that he made sure there would be a general verdict adverse to petitioner.

2. In jury instructions 11 & 12, Judge Brown converted petitioner's "nuisance" actions into "negligence" actions. But see: **(1)** Philadelphia Elec. Co. v. Hercules, Inc. (3 Cir. 1985), 762 F. 2d 303; **(2)** MacDonald v. Perry (1927), 32 Ariz. 39, 255 P. 494; **(3)** Lunt v. Brady Manufacturing Corp. (1970), 13 Ariz. 305, 475 P. 2d 964; **(4)** City of Phoenix v. Johnson (1938), 51 Ariz. 115, 75 P. 2d 30; **(5)** Vincent v. Salt Lake County (Ut. 1978), 583 P. 2d 105; **(6)** E. Rauh & Sons Fertilizer Co. v. Sheffler, 139 F. 2d 38; **(7)** Bohan v. Port Jervis Gas-Light Co., 122 N.Y. 18, 25 N. E. 246; **(8)** Wood v. Picillo (R.I. 1982), 443 A. 2d 1244; **(9)** Restatement of Torts (2d), Sec. 822, Comment on Clause (b), 2nd Par of Subsec. J., page 114; **(10)** Mower v. Ashland Oil & Refining Co. (7th Cir. 1975), 518 F. 2d 659.

3. Jury instruction #13 amounted to a directed verdict for respondents. It instructed the jury that, if petitioner could stand the complained of noise, he must stand it; and intimated to the jury that the court believed that the complained-of-noise was a mere trifle and petty annoyance and disturbance which the law did not concern itself with.

4. Jury instruction #14 is the so-called "Balancing of Equities", with the comparative injury part deliberately omitted. This doctrine is used (in actions between private parties) only when the action is for an injunction pendant lite. Otherwise, it is only used in an action for an injunction where the defendant is imbued with an

interests of the public and the overriding public interest, where the interests of the individual must be considered. It cannot ever be used in actions for damages. To hold that this doctrine could be used in actions between strictly private parties would be to hold that this equitable doctrine negates the Takings Clauses of the 5th and 14th Amendments, and Art. 2, Sec. 17 of the Arizona Constitution. But see: **1.** Restatement of Torts (2d) Sec. 930, last par. of "Comment on Subsection (2)", page 550; **2.** 40 ALR 3rd 601 (annotation - Modern status of rules as of balance of conveniences or social utility as affecting relief from nuisance), at 610, 1st Col., 2nd par.; **3.** Susquehanna Fertilizer Co. v. Malone (1890), 73 Md. 268, 20 A. 900; **4.** Evans v. Reading Chemical & Fertilizing Co. (1894), 160 Pa. 209, 28 A. 702; **5.** New York v. Pine (1902), 185 U.S. 93, 22 S. Ct. 592, 46 L. Ed. 820; **6.** U.S. v. Luce (Cir. Ct. D. Del. 1905), 141 Fed. Rptr. 385; **7.** Booth-Kelly Lumber Co. v. City of Eugene (1913), 67 Or. 381, 136 P. 29; **8.** Mobile & O.R. Co. v. Zimmern (1921), 206 Ala. 37, 89 S. 475, 16 ALR 1352; **9.** City of Phoenix v. Johnson (1938), 51 Ariz. 115, 75 P. 2d 30; **10.** Wright v. Best (1942), 19 Cal. 2d 368, 121 P. 2d 702; **11.** Sam Warren & Son Stone Co. v. Gruesser (1948), 307 Ky. 98, 209 S.W. 2d 817; **12.** Sexton v. Pub. Ser. Coordinated Transport (1949), 5 N.J. Super. 555, 68 A. 2d 648; **13.** Port of N.Y. Authority v. City of Newark (1952), 17 N.J. Super. 328, 85 A. 2d 815; **14.** York v. Stallings (Or. S. Ct., 1959), 341 P. 2d 529; **15.** Anderson v. Souza (1952), 38 Cal. 2d 825, 243 P. 2d 497;

16. Ariz. Hercules C. Co. v. Protestant E. Church Corp. (1920), 21 Ariz. 470, 190 P. 85; **17.** Loma Portal Civic Club v. American Airlines, Inc. (1964), 61 Cal. 2d 582, 394 P. 2d 548; **18.** Stuart v. Lake W Washington Realty Corp. (1956), 141 W. Va. 627, 92 S. E. 2d 891; **19.** Guarina v. Bogart (1962), 407 Pa. 307, 180 A. 2d 557; **20.** Thornburg v. Port of Portland (1966), 244 Or. 69, 415 P. 2d 750; **21.** Gerrish v. Wishbone Farm of N.H., Inc. (1967), 108 N.H. 237, 231 A. 2d 622; **22.** Jost v. Dairyland Power Coop. (1970), 45 Wis. 2d 164, 172 N.W. 2d 647; **23.** Wagner v. Burlington Industries, Inc. (1969), 47 F.R.D. 146; **24.** Cheyenne Airport Bd. v. Rogers (1985), (Wyo. S. Ct.), 707 P. 2d 717; **25.** Restatement of Torts (2d), Ch. 40, Sec. 822, Page 110, Comment "D".

There seems to be much confusion, in the courts, concerning the application of this equitable doctrine. Will this court consider this issue and clear up this confusion?

PRIORITY OF USE

1. As part of instruction #14, the jury was instructed to consider the "Coming to the Nuisance" doctrine. Also, this was the reason given for denial of the requested injunction. But this doctrine has a very limited application. It could be used in a case of a "permanent" private nuisance (only one cause of action and statute of limitations begin to run at creation of nuisance) where a prescriptive right had been obtained, or, where a previous owner had already collected damages. It cannot be applied

(even in a case of a permanent private nuisance) where no prescriptive right had been obtained, and where no previous owner had collected damages. To do so would violate the "takings" clauses of the 5th and 14th Amendments.

2. This doctrine can never be applied in a case of a "continuing", abatable private nuisance (where the statute of limitations are tolled and "every continuance of the nuisance is a new nuisance for which a fresh action will lie" (Baltimore & Potomac R. Co. v. Fifth Bap. Ch. (1891), 137 U.S. 568, 11 S. Ct. 185, 34 L. Ed. 784, Supra.), for the reason that the nuisance occurring today is not the same nuisance that occurred yesterday. The same is true whether the action if for an injunction or damages, or both. To apply this doctrine in such cases would be to hold that this doctrine negated the "takings" clauses of the 5th & 14th Amendments and Art. 2. Sec. 17 of the Arizona Constitution. See:

1. W. Prosser & W. Keeton, The Law of Torts, (5th Ed.), Sec 88b, Pg. 635, 2nd col., 2nd par.; 2. Northwestern Fertilizing Co. v. Hyde Park (1878), 97 U.S. (7 Otto) 659, 24 L. Ed. 1036; 3. U.S. v. Luce (C.C. 1905), 141 Fed. Rptr. 385; 4. Clarke v. Borsen (10 Cir. 1930), 39 F. 2d 800; 5. Patrick v. Sharon Steel Corp. (1982), 549 F. Supp. 1259; 6. Fisher v. Atl. Richfield Co. (1989), 774 F. Supp. 616; 7. Allison v. Smith (Colo. 1984), 695 P. 2d 791; 8. Campbell v. Seaman (1876), 63 N.Y. 568, 20 Am. Rep. 567; 9. Shearing v. City of Rochester (1966), 51 Misc. 2d 436, 173 N.Y.S. 2d 464; 10. Zamzok v. 650 Park Ave. Corp. (1974), 80 Misc. 2d

573, 363 N.Y.S. 2d 868; **11.** Fordham Operating Corp. v. Westchester County (1975), 82 Misc. 2d 566, 370 N.Y.S. 2d 977; **12.** Ensign v. Walls (1948), 323 Mich. 49, 34 N.W. 2d 549; **13.** Curry v. Livestock Market (Ky. 1961), 343 S.W. 2d 134; **14.** Crushed Stone Co. v. Moore (1962), (Okla.), 369 P. 2d 811; **15.** Assoc. Metals & Min. Corp. v. Dixon Chem. & Res. (1962), 82 N.J. Super. 281, 197 A. 2d 569; **16.** Van Fossen v. Clark (1901), 113 Iowa 86, 84 N.W. 989; **17.** Kissel v. Lewis (1901), 156 Ind. 233, 59 N.E. 478; **18.** Richards v. Ohio River R. Co. (1904), 56 W. Vw. 592, 49 S.E. 385; **19.** Oehler v. Levy (1908), 234 Ill. 595, 85 N.E. 271; **20.** Mileur v. McBride (1986), 101 Ill. Dec. 257, 498 N.E. 2d 581; **21.** Seifert v. Dillon (1909), 83 Neb. 322, 119 N.W. 686; **22.** Susquehanna Fertilizer Co. v. Malone (1980), 73 Md. 276, 20 A. 900; **23.** Fish & Game Ass´n. v. Carlucci (1990), 83 Md. App. 121, 573 A. 2d 847; **24.** Carter v. Lake City Baseball Club (1950), 218 S.C. 255, 62 S.E. 2d 470; **25.** Vowinckel v. N. Clark & Sons (1932), 216 Cal. 156, 13 P. 2d 733; **26.** White v. Suncook **Mills (1940, N.H.), 13 A. 2d 729; 27.** Klassen v. Cent. Kan. Coop. Cream Ass´n. (1946), 160 Kan. 697, 165 P. 2d 601; **28.** Robinson v. Westman (1947), 224 Minn. 105, 29 N.W. 2d 1, 174 ALR 746; **29.** Kellogg v. Village of Viola (1975), 67 Wis. 2d 345, 227 N.W. 2d 55; **30.** Cain v. Roggero (1944), 28 Del. Ch. 131, 38 A. 2d 735; **31.** Guarina v. Bogart (1962), 407 Pa. 307, 180 A. 2d 557; **32.** Ellis v. Blanchard (1950, LA.), 45 S. 2d 100; 33. Mahone v. Autry (1951), 55 N.M.

111, 227 P. 2d 623; **34.** Forbes v. City of Durant (1950), 209 Miss. 246, 46 S. 2d 551; **35.** Lawrence v. Eastern Airlines (1955), (Fla.), 81 S. 2d 632; **36.** Roughton v. Thiele Kaolin Co. (1953), 209 Ga. 577, 74 S.E. 2d 844; **37.** Spur Industries, Inc. v. Del E. Webb Development Co. (1972), 108 Ariz. 178, 494 P. 2d 700; **38.** Spain v. City of Cape Girardeau (Mo. 1972), 484 S.W. 2d 498.

3. Petitioner and wife acquired their property on Oct. 23, 1972. Respondents acquiring their property on Dec. 29, 1976. In order to apply this doctrine, Judge Brown had to find that the farm, itself, was a permanent nuisance since 1954, and that the Teco engine (installed in 1992) was exactly the same as the Caterpillar engine (installed in 1974). Petitioner has not alleged that the farm was a nuisance; only that the manner in which these engines were operated permitted these engines to emit noise sufficient to be a nuisance. It would seem clear that Judge Brown was very biased and prejudiced, to the point that the due process clause of the 14th Amendment was violated.

Jury instruction #15 (A.R.S. Sec. 3-112) has already been argued above as Question #1.

LAST CONTROVERSY

1. In the reporter's transcript of Dec. 7, 1994, at page 60, lines 12 thru 17: "**Mr. Willbanks:** Okay. I'll make a motion for mistrial one more time for the record. **The Court:** Thank you, Mr. Willbanks. The record will show that the motion is denied. The record may also show that you do not have

standing to make the motion."
2. Petitioner submitted the question of "standing" to the Appeals Court. The Appeals Court, at page 10, next to last par. of their decision, stated: "Consequently, we do not reach this issue."
3. It seems clear that petitioner does have standing to sue for personal injuries to himself. See: **1.** Ford v. Revlon (1987), 153 Ariz. 38, 734 P. 2d 580; **2.** Armory Park v. Episcopla Community Services (1985), 148 Ariz. 1, 712 P. 2d 914; **3.** 66 C.J.S., Nuisances, Sec 82, P. 838; **4.** 66 C.J.S., Nuisances, Sec. 19, P. 770; **5.** 66 C.J.S., Nuisances, Sec. 13, P. 758; **6.** 66 C.J.S., Nuisances, Sec. 18, P. 765; **7.** 66 C.J.S., Nuisances, Sec. 19, P. 767; **8.** 66 C.J.S., Nuisances, Sec. 8, P. 739; **10.** A.R.S. Sec. 13-2917 (a); **11.** Vann v. Bowie Sewerage Co. (Tex.), 90 S.W. 2d 561; **12.** George v. City of Houston (Tex.), 465 S.W. 2d 387; **13.** Sun Ray Oil Corp. v. Sharpe (1954), 209 F. 2d 937; **14.** Ky. W. Va. Gas Co. v. Lafferty, 174 F. 2d 848; **15.** Gesswin v. Beckwith (Conn. 1978), 397 A. 2d 121; **16.** MacDonald v. Perry (1927), 32 Ariz. 39, 255 P. 494; **17.** U.S. Smelting Co. v. Sisam (8 Cir., 1911) 191 Fed. Rptr. 293; **18.** Klassen v. Central Kan. Coop. Creamery Ass'n, 160 Kan. 697, 165 P. 2d 601.

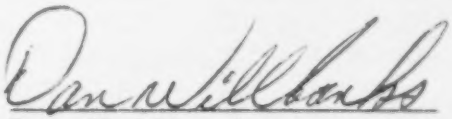
CONCLUSION

1. It would seem clear that by enacting A.R.S. Sec. 3-112, the Arizona Legislature declared "farms" to be a nuisance per se (as did the Court of Appeals at Par. b, pg. 7 of their opinion). It would seem that the harm caused by farming operations, in Arizona, is

caused "under color of state law". As it now stands, the result of this proceeding is: (1) Petitioner is approximately $30,000.00 in debt; (2) petitioner still must endure the same noise that keeps him awake at night; (3) petitioner is denied the right to complain (in court) about this 24-hour-a-day noise. It would seem clear that petitioner has been sentenced to endure this noise for the rest of his life.

2. For all the foregoing reasons, petitioner believes this petition for a Writ of Certiorari should be granted.

Respectfully Submitted



Dan Willbanks, pro se
5158 W. Buford Lane
McNeal, AZ 85617
(520)642-3746

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

Filed September 28, 1995

DAN WILLBANKS, Plaintiff/Appellant,	)	2 CA-CV 95-0111 Department B
v.	)	MEMORANDUM DECISION
JOHN KECK and ALAMO RANCH CO., Defendants/Appellees.	)	Not for Publication Rule 28(a)(2), Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR
COURT OF COCHISE COUNTY

Cause No. CV 92-07-00375

Honorable Michael J. Brown, Judge

AFFIRMED

Dan Willbanks — McNeal
In Propria Persona

Calvin W. Allred — Willcox
Attorney for Defendants/Appellees

E S P I N O S A, Presiding Judge.

Appellant Dan Willbanks appeals from a judgement following a jury verdict in favor of appellees Alamo Ranch Company Alamo), an Arizona Corporation, and its president John Keck, as well as the trial court's findings of fact and conclusions

of law in which his request for injunctive relief of his nuisance claim was denied. Willbanks raises thirty-five issues on appeal, most of which do not merit discussion.[1] For the reasons discussed below, we affirm.

Facts and Procedural History

Willbanks resides on fifty acres of land, owned by his wife, which has common border with property owned and farmed by Alamo. In May 1992, Alamo employed Irrigation Sales and Services to install a replacement for a nearly twenty-year-old unmuffled pump engine on an irrigation well near the Willbanks' property. The new engine's two mufflers were not installed until about two weeks later and it ran continuously without them during that time. In July, Willbanks filed a nuisance complaint

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1For example, Willbanks raises as issues his own standing to sue; whether the engine noise complained of constitutes a "noise easement" or a "taking" of his property pursuant to Ariz. Const. art. II, Sec. 17; whether a doctrine he repeatedly refers to as *sic utere tuo ut alienum non laedas* applies to a private corporate farmer in Arizona; the public policy regarding the interspersing of private residential property and corporate farming land; the level of sound decibels necessary to constitute a nuisance; and whether he was entitled to sanctions against the defendants and their attorney for failure to observe the quoted Latin maxim and accept Willbanks' settlement offer.

against Southwest Gas Corporation, whom he claimed sold the motor to Alamo; J.D. Stevenson, owner of Irrigation Sales and Services,[2] Alamo President John Keck, and another Alamo employee, Jim Crotts, for damages caused by "a large volume of loud noise" from the new irrigation pump engine. Keck and Crotts filed a motion to dismiss for failure to state a claim and a motion for summary judgement on the ground that reasonable activities are protected from nuisance claims under A.R.S. 3-112. Southwest gas joined the motions, which the trial court granted. The judgement in favor of Southwest Gas was affirmed on appeal, but reversed and remanded as to Crotts and Keck. Willbanks v. Southwest Gas Corp., 2 CA-CV 93-0039 (memorandum decision August 17, 1993).

Between October 1992 and July 1993, Willbanks filed five successive complaints against Alamo, seeking a permanent injunction to prohibit the engine noise from "intrud(ing) upon the land and home of plaintiff" and damages for nuisance, conversion, and taking without just compensation.[3] Over Willbanks' objection, the trial court consolidated the five causes with the first action, finding the issues legally

---

2Pursuant to stipulation, Stevenson was dismissed as a defendant.

3Willbanks also filed a sixth complaint against Alamo seeking an injunction prohibiting dogs belonging to an Alamo employee living on the property from trespassing on his land, which was later dismissed at Willbanks' request.

and factually linked.[4]

Trial began on December 6, with the jury to decide the nuisance and damage issues and the court to determine whether to grant injunctive relief. Because Willbanks presented no evidence of damages, the jury was charged with deciding only the issue of whether or not Alamo caused, created, or maintained a private nuisance during the time periods from July 1990 through July 1992, during the two weeks in May 1992 when the new engine ran without mufflers, from May 1992 through September 1993, and from September 1993 through the time of trial. The jury concluded that the defendants had not reasonably interfered with Willbanks' use and enjoyment of the property during any of the time periods. The trial court also reached the same conclusion and denied injunctive relief. The court awarded costs and attorneys' fees to Alamo and Keck.[5]

Consolidation

Willbanks asserts that the trial court "closed the Arizona courts to this

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4We declined to accept jurisdiction of Willbanks' petition for special action review of this ruling, and assessed attorneys' fees as a sanction for bringing a frivolous petition. Willbanks v. Alamo Ranch., 2 CA-SA 93-0114 (September 22, 1993).

5Finding no evidence of Crotts' participation, the court dismissed him as a defendant and Willbanks does not contest this ruling on appeal.

plaintiff" when it consolidated his successive actions for trial. Since all Willbanks' claims involve the same legal issue: whether the noise from the pump engine constituted a nuisance, and most, if not all, the same evidence would be relevant and admissible as to each claim, we can see no abuse of discretion in consolidating the claims, as clearly permitted by Ariz. R. Civ. P. 42(a), 16 A.R.S. Furthermore, Willbanks has demonstrated no prejudice. We note that the court gave the jury separate forms of verdict for the different time frames alleged in Willbanks' various complaints.

Change of Judge

Willbanks also challenges the trial court's denial of his motion for change of judge for cause. Ariz. R. Civ. P. 42(f)(2), 16 A.R.S. The trial court correctly determined that Willbanks' motion, which was based on events that occurred on March 7, 1994, was untimely filed on October 7, 1994. See Ariz. R. Civ. P. 42(f)(2)(C) (motion must be made within twenty days after discovery of grounds for cause). Willbanks further asserts that the court erred in denying his motion for change of judge as of right under Ariz. R. Civ. P. 42(f)(1).[6] However, Willbanks waived this claim when the matter went to trial before the judge he wished to remove. Ariz. R. Civ. P. 42(f)(1)(D); Hickox v. Superior Court, 19 Ariz. App. 195, 505 P.2d 1086 (1973)

6Willbanks previously filed a motion to remove Judge Riley as of right in August 1993 and Judge Brown was then assigned to the case.

(proper method of appealing denial peremptory challenge of judge is special action).

Denial of Injunctive Relief

Willbanks argues that the trial court erred in denying injunctive relief, challenging its findings of fact and conclusions of law. Ariz. R. Civ. P. 52(a), 16 A.R.S. On review, we accept the trial court's findings of fact unless they are clearly erroneous, but we are not bound by its conclusions of law and are free to draw our own conclusions from the facts found by the trial court. Arizona Board of Regents v. Phoenix Newspapers Inc., 167 Ariz. 254, 806 P.2d 348 (1991).

a. Nuisance

A nuisance is defined as "a condition which represents an unreasonable interference with another person's use and enjoyment of his property and causes damage." Graber v. City of Peoria, 156 Ariz. 553, 555, 753 P.2d 1209, 1211 (App. 1988); see also Armory Park Neighborhood Association v. Episcopal Community Services, 148 Ariz. 1, 712 P.2d 914 (1985). In determining whether a nuisance exists, the trial court should consider the totality of the circumstances, including the locality and character of the surroundings, the nature of the defendant's business, the manner in which the business is conducted, the value to the community of the defendant's activities, the defendant's ability to reduce the harm, the priority of use, and the extent to which the defendant would be damaged by an injunction and the

plaintiff would be damaged by the failure to enjoin. McQuade v. Tucson Tiller Apartments, Ltd., 25 Ariz. App. 312,543 P.2d 150 (1975). In determining the reasonableness of the defendant's activities in the surroundings, the court applies a balancing test. Armory Park; McQuade.

Willbanks argues that in concluding that the defendants' interference was not unreasonable, the trial court relied too heavily on the doctrine of "coming of nuisance." The record belies this claim. The court's findings and conclusions clearly reveal that it considered the location and character of the land; the duration of Alamo's business as well as that of the previous owners; how long a well and pump had operated on the property; testimony and its own observations at the site regarding the noise volume of the pump engine;[7] and the defendants' attempt to lessen the volume by installing mufflers.

b. Coming to the nuisance

In a related argument, Willbanks contends that the evidence was insufficient to support consideration of the coming to the nuisance doctrine,

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7The trial court and jury went to Willbanks' property where the jury was instructed to observe the locality and character of the surroundings and the noises that they could hear from the engine and pump. The court and the jury listened to the engine from inside Willbanks' home first with two mufflers and then with the third muffler added.

pointing to his testimony that in 1972 when he purchased his land,[8] "there was no farming going on" on the adjacent property now owned by Alamo. Willbanks admitted, however, that the owner told him he did farm that year, and that there was a pump and engine on the well at the time. Furthermore, Alamo presented evidence that the well had been dug in 1954 and that the land had been farmed and irrigated since the early 1950's, although there were periods when the fields lay fallow and were not irrigated. The evidence was sufficient for the trial court to consider that Willbanks "came to the nuisance."

c. Constitutionality of A.R.S. Sec. 3-112

Willbanks next claims that A.R.S. Sec. 3-112[9] is unconstitutional because it

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8Willbanks subsequently deeded the property to his wife several years before this action, but failed to disclose this to the defendants or the court until after closing arguments.

9A.R.S. Sec. 3-112. **Agricultural operations; nuisance liability.**
A. Agricultural operations conducted on farmland that are consistent with good agricultural practices and established prior to surrounding nonagricultural uses are presumed to be reasonable and do not constitute a nuisance unless the agricultural operation has a substantial adverse effect on the public health and safety.
B. Agricultural operations undertaken in conformity with federal, state and local

effectively grants immunity from nuisance suits to farmers. We disagree. Section 3-112 merely creates a statutory presumption that, under certain circumstances, agricultural operations are reasonable and do not constitute a nuisance. In evaluating an analogous presumption under A.R.S. Sec. 12-567(M), our supreme court stated:

> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of the fact from either the court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents.

Eastin v. Broomfield, 116 Ariz. 576,580, 570 P.2d 744, 748 (1977), quoting Meeker v. Lehigh Valley Railroad Co., 236 U.S. 412, 430, 35 S. Ct 328, 335, 59 L. Ed. 2d 644, 657 (1915). See also State v. Church, 175 Ariz. 104, 854 P.2d 137 (App. 1993) (statutory presumption merely shifts burden of proof). The same is true here; thus, Sec. 3-112 is not constitutionally infirm.

d. Sufficiency of the evidence

Willbanks further contends that the evidence was insufficient to support the

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laws and regulations are presumed to be good agricultural practice and not adversely affecting the public health and safety.

court's conclusion that there was no unreasonable interference with Willbanks' use of the property. Viewing the evidence in the light most favorable to sustaining the court's findings, we will sustain them unless they are clearly erroneous or unsupported by any credible evidence. Federoff v. Pioneer Title and Trust Co. of Arizona, 166 Ariz. 383, 803 P.2d 104 (1990). We have reviewed the record in light of Willbanks' allegations and fine it contains ample credible evidence to support the court's findings, including evidence that the new engine was quieter than the old one in use between 1976 and 1992, and the court's first-hand observation that the current noise was less pronounced than that of Willbanks' refrigerator. Accordingly, the trial court did not err in denying Willbanks' request for injunctive relief.

Jury Instructions

Willbanks argues that the trial court erred in giving certain jury instructions and refusing his proffered instructions. On appeal, "[j]ury instructions are viewed as a whole, with an eye toward determining whether or not the jury has been given the proper rules to apply in arriving at its decision." Catchings v. City of Glendale, 154 Ariz. 420, 424, 743 P.2d 400, 404 (App. 1987). We will not overturn a jury verdict because of instructions that were given unless there is a substantial doubt as to whether the jury was properly guided in its deliberations. Id.

Contrary to Willbanks' assertion, the trial court's instruction that a corporation can act only through its employees and is responsible for the acts

of its employees done within the course and scope of their employment is a correct statement of law. Miller v. Arnal Corp., 129 Ariz. 484, 632 P.2d 987 (App. 1981). Willbanks further argues that the court erroneously instructed the jury to consider Sec. 3-112, claiming that the instruction required the jury to find for Alamo. As discussed above, Sec. 3-112 merely creates a statutory presumption, which Willbanks had the burden to rebut. He also challenges the court's instructions on "reasonableness," "unreasonableness," the "balance of convenience" test, and "coming to the nuisance." These were legally correct instructions on the law of nuisance. See Armory Park; Spur Industries Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972); Graber; McQuade. They were also supported by evidence.

Our review of all the instructions given shows that the jury was properly charged; therefore, the trial court did not err in refusing Willbanks' instructions. See Durnin v. Karber Air Conditioning Co., 161 Ariz. 416, 778 P.2d 1312 (App. 1989).

Finally, although appellees challenge Willbanks' standing to sue as well as bring this appeal, based on his untimely disclosure at the end of the trial that he no longer had any ownership interest in the property, appellees did not cross-appeal from the trial court's implicit denial of their motion for a mistrial on this basis. Consequently, we do not reach this issue. Ariz. R. Civ. App. P. 13(b), 17B A.R.S.; Larkin v. State ex rel. Rottas, 175 Ariz. 417, 857 P.2d 1271 (App. 1992).

The rulings of the trial court are affirmed. Appellees are granted their costs and attorneys' fees on appeal pursuant to Ariz. R. Civ. App. P. 21(c) and 25, 17B A.R.S. See Johnson v. Brimlow, 164 Ariz. 218, 791 P.2d 1101 (App. 1990).

/S/Philip G. Espinosa
Philip G. Espinosa
Presiding Judge

CONCURRING:

/S/William E. Druke
William E. Druke
Chief Judge

/S/James D. Hathaway
James D. Hathaway
Judge 1

APPENDIX B

(Filed October 20, 1995)

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

October 20, 1995

RE: WILLBANKS v. CROTTS/ALAMO RANCH
2 CA-CV 95-0111

Cochise County Superior Court Cause No. CV 92-07-00375

The following action was taken by the Court of Appeals for the State of Arizona, Division Two, Department B on October 19, 1995,

ORDERED: Motion for Reconsideration is DENIED.

It appearing Petition for Hearing En Banc is not provided for under the rules of appellate procedure,

FURTHER ORDERED: Petition for Hearing "En Banc" is DENIED.

Presiding Judge Espinosa, Chief Judge Druke and Judge Hathaway participated in the determination of this matter.

JOYCE A. GOLDSMITH, Clerk

Copy To:

Dan Willbanks
5158 W. Buford Lane
McNeal, Az 85617
(sent certified mail)

LAW OFFICE OF CALVIN W. ALLRED
151 S. Haskell
Willcox, AZ 85643

APPENDIX C

SUPREME COURT
State of Arizona

Noel K. Dessaint, Clerk of Court
Kathleen E.Kempley, Chief Deputy Clerk

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone: (602) 542-9396

April 25, 1996

RE: DAN WILLBANKS vs. JOHN KECK/ALAMO RANCH CO.
Supreme Court No. CV-95-0501-PR
Court of Appeals No. 2 CA-CV 95-0111
Cochise County No. CV 92-07-00375

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 23, 1996, in regard to the above-referenced cause:

ORDERED: Petition for Review by Supreme Court of Arizona = DENIED.

Record returned to Court of Appeals, Division Two, Tucson, this 25th day of April, 1996.

NOEL K. DESSAINT, Clerk

To:

Dan Willbanks
Calvin W. Allred, Esq.
Joyce A. Goldsmith, Clerk, Court of Appeals Division Two, Tucson
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APPENDIX D

ARIZONA SUPERIOR COURT, COCHISE COUNTY

(Filed December 8, 1994)
Judge: HONORABLE MICHAEL J. BROWN
CASE NO. CV 92-07-00375

Court Reporter: None
DATE: December 8, 1994

DAN WILLBANKS, Plaintiff ( )

vs. ( )

ALAMO RANCH COMPANY, et al. ( )

Defendants ( )

EVENT SUMMARY

Type: in chambers ruling on
Result: completed
Type: plaintiff's request for
Type: injunction

M I N U T E E N T R Y

IN CHAMBERS:
Parties are not present.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1) The plaintiff, Dan Willbanks, and defendant, Alamo Ranch Company, an Arizona corporation, own properties next to each other in the southern end of the Sulphur Springs Valley near McNeal, Arizona in Cochise County.

2) The Alamo Ranch Company property has been farmed regularly and continuously since 1954. During all that period of time, it has been farmed as irrigated property and the pump has been operated by an internal combustion engine. From time to time during that forty-year period, the farm has lain fallow either because it was not profitable to operate that particular year or because it was best for the land that it lie fallow (see Leviticus). Nevertheless, at all times it clearly was a farm with an existing well, water tank, pump and engine.

3) The defendant, Alamo Ranch Company, purchased the property in 1976 and included in the purchase was an unmuffled Caterpillar engine on the irrigation pump and a pivot sprinkler system.

4) From a distance of twenty-five feet the Caterpillar engine produced a decibel rating in the high seventies to mid-eighties. The defendant, Alamo Ranch Company, operated the irrigation pump with that Caterpillar engine from 1976 until 1992 when it wore out and was replaced.

5) On or about May 8, 1992, the defendants replaced the Caterpillar engine with a Teco Crusader engine. They ran that engine unmuffled for approximately twelve days until the mufflers were delivered.

6) On or about May 20, 1992, a double muffler was installed on the Teco Crusader engine, after which it produced significantly fewer decibels than did the Caterpillar which preceded it. Plaintiff filed his first lawsuit against these defendants on July 6, 1992; his initial lawsuit was followed by several others, all of which have been consolidated for the purposes of this trial. They include prayers for damages and for injunctive relief.

7) It was understood and agreed before trial that the jury would decide the legal issues (i.e., damages) whereas, the Court would decide the equitable issues (i.e., injunctive relief).

8) Both the plaintiff and his wife testified they could not tell any difference between the noise produced by the Caterpillar engine and the Teco engine with the two mufflers installed. They both acknowledged that the addition of the third muffler in September 1993 made the Teco engine even quieter.

9) The Court and the jury viewed the site and listened to the engine, both in its double muffler stage and its three-muffler stage from various spots on the plaintiff's property adjacent to the defendant's property and from inside the plaintiff's home, both in the living room and bedroom. It was the Court's observation that the noise produced by the plaintiff's refrigerator inside his home was more pronounced than any noises from the defendant's engine or pump

either with two mufflers or three mufflers.

THE COURT CONCLUDES that there is not now nor has there been since 1990 (or 1976) any unreasonable interference with plaintiff's use of the property in question by the defendants' operation of their pump or engines, whichever make they may have been.

THE COURT FURTHER FINDS that injunctive relief is not justified.

IT IS THEREFORE ORDERED that the plaintiff's request for injunction is denied.

Defendant shall have judgement against plaintiff for his costs incurred herein.

cc: Honorable Michael J. Brown
Court Administrator - Pima County
Pima County Superior Court - Martha Myhre
Dan Willbanks - 5158 W. Buford Lane, McNeal AZ 85617
Calvin Allred, Esq. - 151 S. Haskell Ave., Willcox AZ 85643
Clerk of the Court, Cochise County - P.O. Drawer CK, Bisbee AZ 85603 (original)

Linda McCormick
Deputy Clerk

/S/Michael J. Brown
Michael J. Brown
Judge

Supreme Court, U.S.
FILED

96 376 JUL 15 1996.

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DAN WILLBANKS,
PETITIONER

V.

JIM E. CROTTS
JOHN KECK
ALAMO RANCH, CO.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO DIV. 2 OF THE ARIZONA COURT OF APPEALS

SEPARATE APPENDIX

DAN WILLBANKS
5158 W. BUFORD LN.
McNEAL, AZ 85617
(520) 642-3746

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FIRST QUESTION PRESENTED

"Does the Arizona Farm Protection Act (A.R.S. Sec. 3-112) conflict with the provisions of the 5th and 14th Amendments of the U.S. Constitution when used in Tort Actions for Damages based on private nuisance between strictly private parties?

1. U.S. Constitution, Amendment One: "Congress shall make no law---prohibiting---the right of the people---to petition the government for a redress of grievances."
2. U.S. Constitution, Amendment Five: "No person shall be---deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
3. U.S. Constitution, Amendment Seven: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,---."
4. U.S. Constitution, Amendment Fourteen:
   "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
5. Ariz. Constitution, Art. 2, Sec. 3: "The Constitution of the United States

is the supreme law of the land."

6. Ariz. Constitution, Art. 2, Sec. 4: "No person shall be deprived of life, liberty, or property without due process of law."

7. Ariz. Constitution, Art. 2, Sec. 5: "The right of petition---shall never be abridged."

8. Ariz. Constitution, Art. 2, Sec. 9: "No law granting irrevocably any privilege, franchise, or immunity shall be enacted."

9. Ariz. Constitution, Art. 2, Sec. 13: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

10. Ariz. Constitution, Art. 2, Sec. 17: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made---which compensation shall be ascertained by a jury,---."

11. Ariz. Constitution, Art. 2, Sec. 23: "The right of trial by jury shall remain inviolate.---."

12. Ariz. Constitution, Art. 4, Pt. 2, Sec. 19, Par. 6:

"No local or special laws shall be enacted in any of the following cases, that is to say:

6. Limitation of civil actions or giving effect to informal or invalid deeds."

13. Ariz. Constitution, Art. 4, Pt. 2, Sec 19, Par. 13:
"No local or special laws shall be enacted in any of the following cases, that is to say:
13. Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises."

14. Ariz. Constitution, Art. 6, Sec. 17:
"The Superior Court shall be open at all times,---. The right of jury trial as provided by this constitution shall remain inviolate,---."

15. Ariz. Constitution, Art. 18, Sec. 6:
"The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."

16. Ariz. Constitution, Art. 2, Sec.31:
"No law shall be enacted in this state limiting the amount of damages to be recovered for causing death or injury of any person."

17. A.R.S. Sec. 3-112:
"A. Agricultural operations conducted on farmland that are consistent with good agricultural practice and established prior to surrounding nonagricultural uses are presumed to be reasonable and do not constitute a nuisance unless the agricultural operation has a substantial adverse effect on the public health and safety.
B. Agricultural operations undertaken in conformity with federal, state and local laws and regulations are presumed to be good agricultural practice and not adversely affecting the public health and safety."

18. W. Prosser & W. Keaton, the Law of Torts (5th Ed.), C. 15, Sec. 88-B, Pg. 635, 2nd Col., 2nd Par.:

"The prevailing rule is that in the absence of a prescriptive right, the defendant cannot condemn the surrounding premises to endure his operation, and that the purchaser is entitled to a reasonable use and enjoyment of his land to the same extent as any other owner, so long as he buys in good faith and not for the sole purpose of a vexatious lawsuit."

Rule 14(1)(g)(i) - First Question Presented:

1. That the state cannot immunize a private nuisance was argued to the Trial Court on Dec. 6, 1994. (See page 88 of the reporter's transcript of Dec. 6, 1994).
2. Petitioner asked for an opportunity to argue the instructions and was refused. (See pages 142 & 143 of the reporter's transcript on Dec. 6, 1994).
3. Again, (on pages 6 & 7 of the reporter's transcript of Dec. 7, 1994) petitioner argued that A.R.S. Sec. 3-112 applied to only public nuisances.
4. In petitioner's appeal brief, on pages 15 & 16, Par. 24, petitioner raised the question of the unconstitutionality of the Arizona Farm Protection Act, citing the 14th Amendment.
5. On page 20, Par. 7, and page 21, Par. 9, of petitioner's appeal brief, the question of unconstitutionality of Sec. 3-112 is raised.
6. On page 33, Par. (L) of petitioner's appeal brief, Sec. 3-112 is challenged and the 14th Amendment is cited.
7. On page 42, Par. 18, of his appeal brief, petitioner noted that he had already challenged Sec. 3-112 as being unconstitutional on it's face.

8. In petitioner's "Appendix of Authorities" (filed with petitioner's appeal brief), the 14th Amendment was cited and reproduced (Sec. 1) verbatim, at pages 79 & 80 of Appendix.
9. In petitioner's "Motion for Reconsideration", pages 5 & 6, Pars. 15 & 16, petitioner again argued that Sec. 3-112 was unconstitutional, citing Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739, and Richards v. Washington Terminal Co., 233 U.S. 546, 58 L. Ed. 1088, 34 S. Ct. 654.
10. In petitioner's "Petition for Review by Supreme Court of Arizona", on pages 8, 9, & 10, the question of the unconstitutionality of Sec. 3-112 was raised, citing the 5th and 14th Amendments.
11. In petitioner's "Petition for Review by Supreme Court of Arizona", pages 19 & 20, Par. 4, petitioner again argued that Sec. 3-112 was unconstitutional on it's face, citing the 5th and 14th Amendments.
12. In the fourth part of petitioner's "Separate Appendix Filed with Plaintiff's Petition for Review by Supreme Court of Arizona", petitioner quoted verbatim from the authorities (including the 14th Amendment).
13. In the unpublished memorandum decision of Div. 2 of the Ariz. Court of Appeals, filed Sept. 28, 1995 on pages 7 & 8, Par. C., the Appeals Court ruled that Sec. 3-112 was constitutional because it only created a "rebuttable presumption".
14. On Oct. 20, 1995, Did. 2 of the Ariz. Court of Appeals denied petitioner's Motion for Reconsideration.
15. On April 23, 1996, the Arizona Supreme Court denied petitioner's

"Petition for Review" without comment.

VERBATIM - FROM ARGUMENTS BELOW

16. On Page 88 of the Reporter's Transcript of Dec. 6, 1994:

"**Mr. Willbanks:** Now, on the immunity, now it's been settled that the state can immunize a public nuisance, but it cannot immunize a private nuisance. Almeda v. First Baptist Church, which they spelled out just exactly what I said, that the immunization that the legislature can grant against a public nuisance, and is immunized from the state or by the public for an indictment or a civil action.

Richards v. Watson Terminal Co., this was well behind that decision. They said that the rule was that under the 5th Amendment, they had taken a bit of the 5th Amendment, and the state having the same thing in their constitutions, a state could flat not immunize a private nuisance.

Now, the reason behind this thinking because is in Article 2, Sec. 17 of the Arizona Constitution. No property shall be without just compensation, without it first being made either for public use or private use.

If you have a nuisance---a private nuisance is a taking of property. I've laid that out in my pleadings until I got tired of doing it, and I know if anybody read it, they got tired of reading it.

The Court: Thanks, Mr. Willbanks."

17. On pages 142 & 143, beginning at line 17 on 142 of the reporter's transcript of Dec. 6, 1994:

"**The Court:** ---. I will be making a decision as to what instruction I'm going to give sometime between now and 9:30 tomorrow morning.

Mr. Willbanks: And sometime will you give me the opportunity to argue the instructions?

The Court: I will indeed. Well, let me rephrase that. Probably not. I have instructions that you've requested. I have the instructions requested by Mr. Allred. I have instructions that I have prepared. I will give each of you a copy of the instructions that I'm planning to give to the jury, and I will rule on each of the instructions that you have requested.

And let me tell you now so that we won't have to go through this again in the morning, the fact that you have requested a jury instruction and filed an original request with the clerk is a record that you're making, both before me and the Court of Appeals, that the instruction that you have requested in any particular area of law is the most accurate, succinct and articulated expression of the law that anybody could make, and significantly better than any instruction that the court is planning to give in that area.

So, that having been said, that's your record just from having filed instructions.

In addition, you've also made a record that the instructions that you have requested is in conformity with both federal and state statutoiry and constitutional law. And that probably the court's isn't, okay?"

18. <u>On pages 6 & 7 of the reporter's transcript of Dec. 7, 1994, beginning on line 24 of page 6</u>:

"**Mr. Willbanks:** Your honor, could we take a moment and settle this immunity statute? I have the statute right here.

The Court: Okay.

Mr. Willbanks: Can I hand it to you?

The Court: Sure.

Mr. Willbanks: If you will note paragraph B on that, it says that it is not a public nuisance. No where in that thing is a private nuisance mentioned, and a court cannot add to or subtract from a statute.

The Court: Thank you.

Mr. Willbanks: That's the same argument that I gave yesterday.

The Court: Thanks. I understand your position is that this statute merely applies to public nuisances, and---.

Mr. Willbanks: Yes sir.

The Court: I do not read the statute in that way. So that's life. That's a difference of opinion.

Mr. Willbanks: Well, I've already objected.

The Court: Thank you.

Show that the statute that we are referring to is A.R.S. 3-1061 which has been renumbered as 3-112 as amended."

19. Petitioner's Appeal Brief, Pages 15 & 16, Par. 24:

"Is the corporate farmer defendant (in an action for an injunction or damages for a private nuisance of a continuing, abatable character between strictly private parties with absolutely no public interest in either party, against a noise that invades the plaintiff's home 24 hours a day, every day, from early spring until late fall, every year, which can be easily and cheaply abated so that the defendant's irrigation could continue without annoying and disturbing this plaintiff; and where the defendants did nothing to alleviate the noise for over 14 months after plaintiff filed his first suit

against them. and then installed a third muffler which did substantially reduce the exhaust noise of the engine but did nothing to contain the mechanical noise of the engine and pump) immune from suit pursuant to the provisions of A.R.S. Sec. 3-061, or, is A.R.S. 3-1061 unconstitutional on it's face as being in violation of Art. 2, Sec. 13 of the Arizona Constitution (Equal Privileges and Immunities); Art. 2, Sec. 4 of the Arizona constitution (Due Process of Law); Art. 2, Sec. 17 of the Arizona Constitution (no taking or damaging of private property without just compensation having first been made); the equal protection clause of the 14th Amendment of the U.S. Constitution;?"

20. Petitioner's Appeal Brief, Page 20, Par. 7.:

"Probably the most relevant reason for the lack of challenges is Arizona's "so-called" Farm Protection Act (A.R.S. Sec. 3-112). This plaintiff has challenged this statute as being unconstitutional on it's face. Judge Brown would not declare the defendants in this case to be immune from suit under this statute, and dismiss plaintiff's cases. Instead, Judge Brown instructed the jury to consider this statute, thereby insuring a verdict in favor or the defendants."

21. Petitioner's Appeal Brief, Page 21, Par 9.:

"Therefore, because of the importance (statewide) to the people who live adjacent to farmers irrigation operations; and the clear unconstitutionality of A.R.S. Sec. 3-112; the apparent confusion among lawyers and some (if not all) Superior

Court judges as to the difference between: (a) a public and private nuisance; (b) a continuing and permanent nuisance; (c) the difference where there is a public interest in the defendant's activities and where there is none; (d) the difference in a suit in pure equity for an injunction and a strictly legal action for damages only; (e) the right to a jury trial in these kind of actions; (f) the right of access to the courts in these kinds of actions, etc.; this plaintiff requests (no. literally begs) this court to carefully consider the issues of law raised in this appeal, and issue it's decision as a "reported, published, decision", in order to make clear the law in these kinds of cases, so that this court's decision will be available for all to see, and be guided by in the future."

22. Petitioner's Appeal Brief, Page 33, Par. (L).:

"Was the interference "reasonable" because Judge Brown believed the defendants were "immune" from suit pursuant to the provisions of A.R.S. Sec 3-112? See authorities cited in Appendix #19, App. PP. 79 & 80. A.R.S. Sec. 3-112 is clearly unconstitutional on it's face. Since a private nuisance is a "taking or damaging" of private property, it violates Art. 2, Sec. 4, of the Arizona Constitution (no taking of property without due process of law); it violates Art. 2, Sec. 17, of the Arizona Constitution (no taking or damaging of private property without just compensation having first been made); and, since A.R.S. Sec. 3-112 attempts to grant immunity only to farmers, it violates Art. 2, Sec. 13,

of the Arizona Constitution (no granting of privileges or immunities to any citizen or corporation which shall not equally belong to all citizens or corporations). It violates the 14th Amendment to the U.S. Constitution (no state shall---deny to any person---the equal protection of the law). It is obvious that A.R.S. Sec. 3-112 is a "special" law, designed to protect only a limited, special class of people: the farmer. But, under our constitutions, the only "nuisances" the legislature can "legalize" are those created for the public good; those who have the power of eminent domain, thereby forcing the payment of "just compensation".

23. Petitioner's Appeal Brief, Page 42 & 43, Par. 18.:

"In jury instruction #15, transcript p. 40, lines 5 thru 16, Judge Brown instructed the jury to consider A.R.S. Sec. 3-112, and gave the jury a written copy of this statute to consider. Plaintiff has already challenged this statute as being unconstitutional on it's face, in paragraph 21(1) on page 33 of this brief (argument on denial of injunction). This instruction required the jury (before they could find a nuisance) to find that the complained of noise "has a substantial adverse effect on the public health and safety". It further informs the jury that so long as the defendants acted "in conformity with federal, state and local laws and regulations" they were not adversely affecting the public health and safety. Plaintiff's actions were for a private nuisance, and the alleged nuisance is situated on private property, approx. 1 mile from the

nearest road. See authorities cited in Appendix #22, App. Pp. 84 thru 87, especially City of Phoenix v. Johnson, 51 Ariz. 115, 75 P. 2d 30. And, once again, this instruction directed attention to the actions of the defendants and away from the noise and it's effect on the plaintiff. See again, Appendix #23, App. Pp. 88 thru 90. Especially Lunt v. Brady Manufacturing Corp., 13 Ariz. App. 305, 475 P. 2d 964."

24. Appendix #19, in Petitioner's "Appendix of Authorities" (filed with petitioner's Appeal Brief), at Pages 70 & 80.:

"_____IMMUNITY_____"

1. A.R.S. Sec. 3-1061. Agricultural Operations; Nuisance Liability

"A. Agricultural operations conducted on farm land that are consistent with good agricultural practice and established prior to surrounding nonagricultural uses are presumed to be reasonable and do not constitute a nuisance unless the agricultural operation has a substantial effect on the public health and safety.

B. Agricultural operations undertaken in conformity with federal, state, and local laws and regulations are presumed to be good agricultural practice and not adversely affecting the public health and safety."

2. Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739, at 745, 1st Col., 2nd Par.:

"The acts that a legislature may authorize, which, without such authority, would constitute nuisances, are those which affect public highways

or public streams, or matters in which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

3. Richards v. Washington Terminal Co., 233 U.S. 546, 58 L. Ed. 1088, 34 S. Ct. 654, at 657, 1st Col., 1st Par.:

We deem the true rule, under the 5th Amendment, as under State Constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance---."

4. Arizona Constitution, Sec. 4 of Art. 2.:

"No person shall be deprived of life, liberty. or property without due process of law."

5. Arizona Constitution, Art. 2, Sec. 17.:

"---. No private property shall be taken or damaged for public or private use without just compensation having first been made,---."

6. Arizona Constitution, Art. 2, Sec. 13.:

"No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

7. Arizona Constitution, Art. 2, Sec. 3.:

"The Constitution of the United

States is the supreme law of the land."

8. The U.S. Constitution, Amendment 14, Section 1.:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

9. City of Phoenix v. Johnson, 51 Ariz. 115, 75 P. 2d 30, at 36, bottom of 1st Col., top of 2nd Col.:

"The court had instructed the jury as follows: "You are instructed that plaintiffs' complaint is an action by private individuals for alleged special damages alleged to have been caused them by the maintenance of a public nuisance. Under our statute (Section 4693, Rev. Code 1928) a public nuisance is defined as anything which is injurious to health or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or by any considerable number of persons."

"Since this was an action for a private, instead of a public nuisance, the instruction given was erroneous, but as it imposed a greater burden of proof upon the plaintiffs than was required by law, and since its giving is not assigned as error, defendant is not in a position to complain of it.

The instruction requested required the jury to find that the odors complained of constituted a public, as well as a private, nuisance, or to return a verdict for defendant. This is not the law. Plaintiffs had the right to recover damages if a private nuisance existed."

25. In Petitioner's Motion for Reconsideration (to Div. 2, Ct. of App.), on Pages 5 & 6, Pars. 15 & 16.:

"15. Again, Sec. 3-112 can be applied only to public nuisances, and only to suits (civil or criminal) by the state or political subdivisions. The words of 3-112(a) "---unless the agricultural operation has a substantial effect on the public health and safety." (Emphasis added). Also, the words of 3-112(b): "--- and not adversely affecting the public health and safety." (Emphasis added). Again, see Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739, at 745, 1st Col., 2nd Par.; Richards v. Washington Terminal Co., 233 U.S. 546, 58 L. Ed. 1088, 34 S. Ct. 654, at 657, 1st Col., 1st Par.; and see Finlay v. Finlay (1993), 18 Kan. App. 2d 479, 856 P. 2d 183, at 188. 1st & 2nd Col., Notes (5) & (6,7), (citing the Nebraska Supreme Court in Flansburgh v. Coffee (1985), 220 Neb. 381, 370 N.W. 2d 127), construing a statute identical to 3-112, and holding that any change in the nuisance negated the statute. Consider the words of the legislature: "Article 2. Limitation on Nuisance Suits Against Agricultural Operations". (Emphasis added). And in the historical and statutory notes the legislature declares that agricultural

operations conducted on farmland in urbanizing areas are often subject to nuisance lawsuits and that the litigation encourages and even forces the premature removal of the land from agricultural uses. In this act, it is the intent of the legislature to ensure that agricultural operations conducted on farmland be adequately protected from nuisance litigation. (Emphasis added).

And further, consider that date of enactment. Immediately under Sec. 3-112, it states:

"Added as Sec. 3-1061 by laws 1981, Ch. 168, Sec. 2. Renumbered as Sec. 3-112 by laws 1990, Ch. 374, Sec. 6, Eff. January 1, 1991."

16. It is clear that the legislature did not create a "rebuttable presumption". They intended to protect a farmer as much as they could, which was from suits (civil or criminal) from the state for public nuisance. Here, it was applied in a suit for private nuisance between strictly private parties, and is clearly unconstitutional. Ex Post Facto laws are prohibited. At the date of enactment or 3-112, the farming operation sought to be protected was that of the defendants. Nothing done by Jones or Becker is relevant to this statute. The defendants bought their land in December, 1976, over four years after plaintiff and his wife purchased their property. Sec. 3-112 was given to the jury, intentionally to confuse and mislead the jury, and to be very prejudicial to this plaintiff. It was intended to focus the attention of the jury on the actions of the defendants and away from the effects of the noise

on this plaintiff."

26. In Petitioner's "Petition for Review by Supreme Court of Arizona", on Pages 8, 9, & 10.:

"Reasons Petition should be Granted

1. This is a case of first impression. Plaintiff finds no reported cases (from any jurisdiction) where the cause of action was the noise from a farmer's irrigation operation.

2. This is a case of state-wide importance. The testimony at the trial of this case established that farmers routinely operate their irrigation engines, without mufflers, in close proximity to the residences of others; there are hundreds (if not thousands) of irrigation engines and pumps in this state.

3. No Arizona decision controls the following points of law. (1) The effect of the Arizona Farm Protection Act (A.R.S. Sec. 3-112) on a strictly private nuisance. (2) Whether a change in the structure of the nuisance will negate the statute. (3) Whether the statute can be applied retrospectively. (?Ex Post Facto?). (4) Whether the statute is unconstitutional on it's face, as being in violation of Art. 2, Secs. 4 & 17 of the Arizona Constitution, and Amendments 5 & 14 of the U.S. Constitution. (5) Whether, in a case of private nuisance between strictly private parties, the giving of a copy of this statute to the jury, and instructing them to consider it, constitutes reversible error. (6) Whether (even if the statute was constitutional, and could be applied to Tort Actions for Damages only, in a case of private nuisance between strictly private parties, and could be

applied Ex Post Facto), this statute would protect a farmer who bought his property and established his farming operation well after plaintiff had established his home, and well after the area had been zoned RU-4, and the nuisance had greatly increased since plaintiff had established his home.

In this case, where the jury was supposedly sitting to determine liability and damages in Tort Actions for Damages only, for a private nuisance between strictly private parties, the jury was instructed to consider this statute and given a copy of it for their consideration. Plaintiff contends that A.R.S. Sec. 3-112 is unconstitutional on it's face. Since a private nuisance is strictly tied to an "interest in the use and enjoyment of property", and may constitute a "taking or damaging" of private property, Sec. 3-112 runs squarely into Art. 2, Secs. 4 & 17 of the Arizona Constitution, and the 5th & 14th Amendment of the U.S. Constitution. Plaintiff contends that the only nuisances the legislature can immunize are public nuisances and then only from actions (either civil or criminal) by the state or any of it's political subdivisions. And, even if this should be the case, Sec. 3-112 is unconstitutionaly vague.

This issue was argued on page 33 of plaintiff's Appeal Brief; authorities were cited (and quoted from on pages 79 & 80 of Appendix #19 in plaintiff's "Appendix of Authorities" filed with plaintiff's Appeal Brief); reargued on pages 5-7 of Plaintiff's Motion for Reconsideration filed in the Court of

Appeals; all of which are included as the fourth part in the Appendix filed with this petition.

In Finlay v. Finlay (June 25, 1993), 18 Kan. App. 2d 479, 856 P. 2d 183, the court noted that "at least 47 other states have enacted some kind of "Right to Farm" law. The court held that the "Right to Farm" law did protect farmers from nuisance suits, but that any change in the nuisance negated the "Right to Farm" law. The Kansas Statute (K.S.A. 2-3201 & 2-3202) seems to be identical to the Arizona Statute. "Finlay" was an action in equity, for an injunction. The issue of "constitutionality" was neither raised or considered.

In Flanburgh v. Coffee (July 5, 1985), 220 Neb. 381, 370 N.W. 2d 127 (Action for Injunction & Damages, and the court stated "we therefore do not concern ourselves with the money award"), the Supreme Court of Nebraska held that Neb. Right to Farm Act (Neb. Rev. St. Sec. 2-4401 to 2-4404) did not apply where there had been no change in the plaintiff's use of his property, but there had been a change in the defendant's use of his property. The question of "constitutionality" was not raised or considered.

In Cline v. Franklin Pork Inc. (Feb. 8, 1995), 219 Neb. 234, 361 N.W. 2d 566 (Action in Equity for Injunction), the Supreme Court of Nebraska held that their "Right to Farm" act did not apply because there had been no change in the plaintiff's use of his property "subsequent to commencement of operation of the (defendant's) facility". The issue of "constitutionality" was not raised or considered. This court noted, but

did not consider, the important question of whether their "Right to Farm" act could be applied retrospectively. (?Ex Post Facto?). The Court of Appeals, in it's memorandum decision, sought to avoid the question by holding that Sec. 3-112 merely created a "rebuttable presumption". This is obviously not true. The words of the "Historical and Statutory Notes" are clear and unambiguous: "In this act, it is the intent of the legislature to ensure that agricultural operations conducted on farmland be adequately protected from nuisance litigation". However, even if Sec. 3-112 was merely a "rebuttable presumption", it would still be an impermissible burden on Art. 2, Secs. 4 & 17 of the Arizona Constitution, and Amendments 5 & 14 of the U.S. Constitution. Also, absent express provision in the statute itself, it cannot be applied retrospectively (Ex Post Facto). It would seem clear that giving this statute to the jury, in private nuisance Tort Action for Damages only, constitutes reversible error."

27. <u>In Petitioner's "Petition for Review by Supreme Court of Arizona", on Pages 19 & 20, Par. 4.</u>:

"The Arizona Farm Protection Act (A.R.S. Sec. 3-112) is unconstitutional on it's face as being in conflict with Art. 2, Secs. 4 & 17 of the Arizona Constitution and Amendments 5 & 14 of the U.S. Constitution; it's stated purpose is to protect farmers from nuisance litigation; it's unconstitutionally overbroad & unconstitutionally vague; it is a "special law" affecting farmers only and is therefore in

conflict with Art. 2, Sec. 13, and Art. 4, Sec. (2)(19)(13) of the Arizona Constitution; it also violates the "Equal Protection" clause of the 14th Amendment to the U.S. Constitution. Giving this instruction to the jury misled, confused, & prejudiced the jury and constitutes reversible error. See fourth part of Appendix, filed herewith."

28. In the Unpublished Memorandum Decision of Div. 2 of the Ariz. Ct. of App. (filed Sept. 28, 1995), on Pages 7 & 8, Par. c.:

"C. Constitutionality of A.R.S. Sec. 3-112.

Willbanks next claims that A.R.S. Sec. 3-112 is unconstitutional because it effectively grants immunity from nuisance suits to farmers. We disagree. Section 3-112 merely creates a statutory presumption that, under certain circumstances, agricultural operations are reasonable and do not constitute a nuisance. In evaluating an analogous presumption under A.R.S. Sec. 12-567(m), our Supreme Court stated:

> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either the court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents.

Eastin v. Broomfield, 116 Ariz. 576, 580, 570 P. 2d 744, 748 (1977), quoting Meeker v. LeHigh Valley Railroad Co., 236 U.S. 412, 430, 35 S. Ct. 328, 335,

59 L. Ed. 2d 644, 657 (1915). See also State v. Church, 175 Ariz. 104, 854 P. 2d 137 (App. 1993) (Statutory Presumption Merely Shifts Burden of Proof). The same is true here; thus, Sec. 3-112 is not constitutionally infirm."

SECOND QUESTION PRESENTED

"Was this petitioner effectively denied a jury trial to determine liability and damages for annoyance, inconvenience, and discomfort of his home, in violation of the 7th and 14th Amendment to the U.S. Constitution?"

1. U.S. Constitution, Art. 6, 2nd Par.:
   "This constitution, and the laws of the United States which shall be made in pursuance thereof;---, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."
2. Az. Constitution, Art. 2, Sec. 3:
   "The Constitution of the United States is the supreme law of the land."
3. Az. Constitution, Art. 6, Sec. 26:
   "Each justice, judge and justice of the peace, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Arizona, and that he will faithfully and impartially discharge the duties of his office to the best of his ability."
4. U.S. Constitution, Amendment 14(1):
   "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities or citizens of the Unites States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Az. Constitution, Art. 2, Sec. 4.:
"No person shall be deprived of life, liberty, or property without due process of law."

6. U.S. Constitution, Amendment 1.:
"Congress shall make no law--- prohibiting---the right of the people-- to petition the government for a redress of grievances."

7. Az. Constitution, Art. 2, Sec. 5.:
"The right of petition,---shall never be abridged."

8. Az. Constitution, Art. 18, Sec. 6.:
"The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."

9. Az. Constitution, Art. 4, Part 2, Sec. 19, Par. 6.:
"No local or special laws shall be enacted in any of the following cases, that is to say:
6. Limitation of civil actions--."

10. U.S. Constitution, Amendment 7.:
"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,---."

11. Az. Constitution, Art. 2, Sec. 23.:
"The right of trial by jury shall remain inviolate.---".

12. Az. Constitution, Art. 2, Sec. 17.:

"---. No private property shall be taken or damaged for public or private use without just compensation having first been made,---, which compensation shall be ascertained by a jury--."

13. Az. Constitution, Art. 6, Sec. 17.:

"---. The right of jury trial as provided by this constitution shall remain inviolate,---."

Rule 14(1)(g)(i) - Second Question Presented

1. On page 37 of the reporter's transcript of Aug. 9, 1993, lines 10 thru 14; Judge Riley speaking:

"What I will do though is order that since all of these matters have been consolidated, and all of them appear to be dealing with the same issues, just different time frames, as the alleged nuisance has continued, I will order that CV 92-10-510 be the main case."

2. On page 5 of the reporter's transcript of Aug. 9, 1993, lines 17 thru 21; petitioner speaking:

"Now, let's see if it should have been brought as one. You got Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 137 U.S. 568, 11 Supreme Court 185, 34 lawyers edition 784, at 785, 2nd Col., 2nd and 3rd par. of the opinion."

3. In the reporter's transcript of Aug. 9, 1993, from line 20, page 15, thru line 7, page 16; petitioner speaking:

"Now, and further--to stop me from filing any of the other complaints, you're just completely denying me access to the courts because right now they're shut down cutting hay. It should start up tomorrow or the next day, or maybe today. Now, what happens

then? You've set one case. Now, if the court consolidates and rules that I can't file anymore, they're maintaining the nuisance, taking their noise easement under color of law.

Now, that kicks in the 5th and 14th Amendments of the U.S. Constitution, and it starts the old Civil Rights Act, 42 U.S. Code 1983, jurisdiction would be laid in 28 U.S. Code 1343. I now have to file my motion, my action in Federal Court, and it might lie."

4. On line 22, page 16, thru line 1, page 17, of the reporter's transcript of Aug. 9, 1993, petitioner speaking:

"Now, let's go to inverse condemnation. See, a nuisance is not just a nuisance alone. When the nuisance is continuing and recurring, it is also the taking of property, in violation of the Arizona Constitution, U.S. Constitution and every other state constitution I can find."

5. Judge Riley simply ignored petitioner's argument.

6. Minute entry of Judge Riley dated September 15, 1993:

"The plaintiff having filed a Notice of Change of Judge in cause number CV 92-07-00375, and it appearing to the court that the issues in that cause number are legally and factually linked with the issues in previously consolidated cause numbers CV 92-10-00510, CV 93-03-00097, CV 93-05-00206, CV 93-06-00248 and CV 93-07-00318, it is ordered: that the above-cited cause numbers be consolidated into cause number CV 92-07-00375 and CV 92-07-00375 shall become the new main cause number, and this matter shall be referred to court administration for reassignment pursuant to the Notice of

Change of Judge. The division assigned should be advised there are several outstanding issues to be calendared."

7. In petitioner's "Motion to Vacate the Orders of Div. 3 of the Superior Court of Cochise County dated Aug. 9, 1993, and September 15, 1993." (Filed Jan. 18, 1994) at page 33.:

"1. The Constitution of Arizona, Art. 2, Sec. 4.:

"No person shall be deprived of life, liberty, or property without due process of law."

2. The Constitution of Arizona, Art. 2, Sec. 17.:

"Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made."

3. The U.S. Constitution, Amendment V:

"No person shall*****be deprived of life, liberty, or property, without due process of law;***."

4. The U.S. Constitution, Amendment XIV.:

"Section 1. ****Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

8. On page 21 of the reporter's transcript of Aug. 9, 1993, lines 16 thru 20; Judge Riley speaking:

"You can tell one jury one time. This is an equitable case, in any event, the jury simply be advisory.

The advisory jury can be disregarded by the court. So, effectively, this will be a trial with the court with an advisory jury, if there is one at all."

9. In the reporter's transcript of Dec. 7, 1994, at page 39; Judge Brown instructing the jury:

"Ladies and gentlemen, in order for you to award damages in this case, there must be some evidence of damage to plaintiff's real property. There has been no such evidence admitted during this trial. Therefore, you will not be able to award damages with your verdict. However, the object of a jury trial is to resolve disputes between your fellow citizens. I believe that you will still be able to do that with your verdict, notwithstanding the lack of evidence with respect to damages."

10. In the memorandum of points and authorities attached to petitioner's "Motion to vacate the orders of Div. 3 of the Superior Court of Cochise County dated Aug. 9, 1993, and September 15, 1993" (filed Jan. 18, 1994), at page 40, Par. 1.:

"The right to trial by jury is guaranteed by the seventh amendment to the Constitution of the United States."

11. And further, in petitioner's "Motion to Vacate" (filed Jan. 18, 1994), beginning at Par. 4 on page 41 thru Par. 5 on page 43.:

"4. In a case dealing with just such a situation as we have here, the U.S. Court of Appeals for the Ninth Circuit, in DePinto v. Provident Security Life Insurance Co., 323 F. 2d 826, at 828, 1st Col., Last par.:

"After a trial with what the District

> Court finally determined to be an Advisory Jury, the court entered judgement ***."

And further, at 834, Note (8):

> "(8) Although this is a diversity suit, the right to a jury trial is to be determined as a matter of federal law. ***In making that determination we also have in mind this admonition by the Supreme Court announced in Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501, 79 S. Ct. 948, 952, 3 L. Ed. 2d 988: "***Maintenance of the jury, as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care."

And further, at 835, 2nd Col., and 836, 1st Col., notes (9) & (10):

> "(9) ***As pointed out in Beacon, legal and equitable issues can be tried at the same time, the jury (if one has been demanded), rendering a verdict on the legal issues, and the court rendering a decision on the equitable issues."
>
> "(10) Thus, except under most imperative circumstances, a right to a jury trial on legal issues may not now be denied to a federal litigant on the ground that the case reached court only through equity, or because equitable rights are involved, or because the legal issues are "incidental" to the equitable issues, (footnote 19) or because substantive equitable remedies are sought, or by the device of trying the equitable issues first. (footnote 20).

Footnote 19:

"In Dairy Queen, Inc. v. Wood, 369 U.S. 469, at pages 470-471, 82 S. Ct. 494, at page 896, 8 L. Ed. 2d 44, it was pointed out that the view that the right to a trial by jury may be lost as to legal issues where those issues are characterized as "incidental" to the equitable issues, has not prevailed since Scott v. Neely, 140 U.S. 106, 11 S. Ct. 712, 35 L. Ed. 358, was decided in 1891."

Footnote 20:

See Dairy Queen, Inc. v. Wood, 369 U.S. at 472-473, 82 S. Ct. at 897, 8 L. Ed. 2d 44; Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-511, 79 S. Ct. 948, 3 L. Ed. 2d 988; Therostich, Inc. v. Chemi-Cord Processing Corp., 5 Cir., 294 F. 2d 486, 488-491."

5. Pernell v. Southall Realty, 416 U.S. 363, 94 S. Ct. 1723, 40 L. Ed. 2d 198, at 206, 3rd Par.:

"This court has long assumed that actions to recover land, like actions for damages to a person or property, are actions at law triable to a jury. In Whitehead v. Shattuck, 138 U.S. 146, 151, 34 L. Ed. 873, 11 S. Ct. 268, (1891), for example, we recognized that "(i)t would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law...; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgement, the action is one at law."

12. In petitioner's appeal brief, on page 37, par. 7.:

"It would seem clear that the "jury trial" had on December 6 & 7, 1994, was the "advisory jury" ordered by Judge Riley on August 9, 1993. See reporter's transcript of the August 9, 1993, hearing (furnished herewith) at page 21, lines 16 thru 20; and the "argument", the statement of facts, pp. 3 thru 6, in plaintiff's motion for new trial filed on February 17, 1995. Dkt. #172."

13. In petitioner's "Motion for new Trial pursuant to Rule 59(a), Az. R. Civ. P", on page (4), Par. 4 & 5.:

"4. It is clear, from the instructions given the jury, instructions refused, the general verdict forms given to the jury, etc., that the jury trial had on December 6 & 7, 1994, was the "advisory jury" ordered by Judge Riley, on the equitable issue. The jury was not given instructions as to damages, although requested by both parties; the jury was not given the definition of "nuisance" found in the Arizona statute, and as defined by the U.S. Supreme Court; the jury was not instructed that "noise can be a nuisance", etc. 5. A judge may not deny a jury trial on all legal issues of fact (damages, etc.) merely because equity has entered a case through the contrivance of a judge. See DePinto v. Providence Security Life Ins. Co. (9th Cir. 1963), 323 F. 2d 826, and cases cited therein.---."

14. In minute entry of Judge Brown, dated November 3, 1994, Paragraphs 4, 5, & 6.:

"It is further ordered that plaintiff's motion to vacate Judge Riley's orders of consolidation and, inferentially, this court's orders consolidating these

actions on the basis that the plaintiff is entitled to a separate jury trial for each occurrence is denied.

The court finds that the motion is spurious and without merit on its face.

This court therefore orders sanctions against the plaintiff in the amount of $500.00, to be paid the clerk of the court for later disposition by court order of this division."

15. Judge Brown completely disregarded petitioner's argument regarding a jury trial and imposed a sanction of $500.00 on petitioner for filing the motion.

16. Petitioner's argument to the Appellate Courts were also completely disregarded. Div. 2 of the Arizona Court of Appeals simply affirmed Judge Brown.

17. The Supreme Court of Arizona, on April 23, 1996, simply denied, without comment, petitioner's "Petition for Review".

SECOND QUESTION PRESENTED CONSOLIDATION

In a case of a private nuisance of a continuing abatable character between strictly private parties, where the state mandates that an injured plaintiff has no election as to filing one suit or successive actions but must file successive actions for successive injuries; would the consolidation of the successive actions, by a State Superior Court Judge, violate the right to trial by jury; violate the right of access to the courts; violate the due process clause of the 14th Amendment; conflict with the holdings of this court in Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113; and Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265; as well as

the 6th circuit's case of Morrison v. Lipscomb, 877 F. 2d 463? And would not consolidation affect the right to recover damages, since juries would be more likely to award more in a series of suits than in only one action with only one award of damages?

1. U.S. Constitution, Amendment 14 (1).:
"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
2. Az. Constitution, Art. 2, Sec 4.:
"No person shall be deprived of life, liberty, or property without due process of law."
3. Az. Constitution, Art. 2, Sec. 31.:
"No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."
4. Az. Constitution, Art. 18, Sec. 6.:
"The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."
5. Az. Constitution, Art. 4, Part 2, Sec. 19, Par. 6.:
"No local or special laws shall be enacted in any of the following cases, that is to say:
6. Limitation of civil actions----"

6. U.S. Constitution, Amendment 1.:
"Congress shall make no law---prohibiting---the right of the people ---to petition the government for a redress of grievances."
7. Az. Constitution, Art. 2, Sec. 5.:
"The right of petition,---shall never be abridged."
8. U.S. Constitution, Art. 6, 2nd Par.:
"This constitution, and the laws of the United States which shall be made in pursuance thereof;---, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."
9. Az. Constitution, Art. 6, Sec. 26.:
"The Constitution of the United States is the supreme law of the land."
10. Az. Constitution, Art. 6, Sec. 26.:
"Each justice, judge and justice of the peace shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Arizona, and that he will faithfully and impartially discharge the duties of his office to the best of his ability."
11. Arizona Judicial Performance: Standards:
"The judge shall administer justice fairly, ethically, uniformly, promptly, and efficiently. The judge shall be free from personal bias in decision making, shall decide cases based on proper application of law procedure to the facts, and shall issue prompt, clear rulings and decisions that demonstrate competent legal analysis. The judge shall act with dignity, courtesy, and patience. The judge

shall effectively manage the courtroom and discharge the administrative responsibilities of the office."

12. The Arizona Supreme Court, on April 23, 1996, simply denied, without comment, petitioner's "Petition for Review".

COMPLIANCE WITH S. CT. RULE 14(1)(g)(i)

1. In the reporter's transcript of the hearing before Judge Riley on Aug. 9, 1993, at page 15, line 20, thru line 7 on page 16. Willbanks speaking:

"Now, and it further---to stop me from filing any of the other complaints, you're just completely denying me access to the courts because right now they're shut down cutting hay. It should start up tomorrow or the next day, or maybe today. Now what happens then? You've set one case. Now, if the court consolidates and rules that I can't file any more, they're maintaining the nuisance, taking their noise easement under color of law.

Now, that kicks in the fifth and fourteenth amendments to the U.S. Constitution, and it starts the old Civil Rights Act, 42 U.S. Code 1983, jurisdiction would be laid in 28 U.S. code 1343. I now have to file my motion, my action in Federal Court. And it might lie."

2. In the reporter's transcript of the hearing before Judge Riley on Aug. 9, 1993, at page 20, lines 1 thru 10. Riley speaking:

"---. You said a lot of things in your argument that are just legally wrong. Just as a quick example, you alluded to the fact that the fifth and fourteenth amendments will come into play. You have to understand those

amendments prohibit the government taking the property without due process of law. They don't apply to private corporations in nuisance suits.

Mr. Willbanks: "If....."

The court: "Now, Mr. Willbanks, please, don't interrupt me.---."

3. In petitioner's "Motion to vacate the orders of Div. 3 of the Superior Court of Cochise County dated Aug. 9, 1993, and September 15, 1993", on page 1 of the "Memorandum of Points and Authorities", page 1.:

"The first consideration must be whether, or not, I have a right to maintain "successive" actions against this defendant, so let's first consider the exact words of the courts:" (Petitioner cited six Arizona decisions; seven Federal decisions; one English decision; and 24 decisions from 21 other states. These decisions are cited below.

4. In the minute entry of Judge Brown (w/o hearing), dated Nov. 3, 1994, on page 3; paragraphs 4, 5, & 6.:

"It is further ordered that plaintiff's motion to vacate Judge Riley's orders of consolidation and, inferentially, this court's orders consolidating these actions on the basis that the plaintiff is entitled to a separate jury trial for each occurrence is denied.

The court finds that the motion is spurious and without merit on its face.

This court therefore orders sanctions against the plaintiff in the amount of $500.00, to be paid within thirty days to the Clerk of the Court for later disposition by court order of this division."

5. In petitioner's appeal brief, pages

35 & 36, paragraphs 3 & 4.:

"3. Issue #3. "Successive Actions". All of the authorities mandate that, in a case of a continuing, abatable, private nuisance, between strictly private parties, an injured plaintiff cannot bring but one action, but is confined in his remedy to the bringing of "Successive Actions" for "Successive Injuries" as the injuries occur. It seems that each continuance of the nuisance is a new nuisance for which a fresh action will lie, and that the purpose of "Successive Actions" is to secure the abatement of the nuisance. See the authorities cited in Appendix # 3, App. pp. 12 thru 14, and the authorities cited in the memorandum of points and authorities are attached to the plaintiff's motion to vacate the orders of Judge Riley, pages 1 thru 32, Dkt. #87. And it would seem that "Successive Actions" do work. After more than 14 months from the time the plaintiff filed his first action against them (and 6 more actions having been filed), the defendants, in Sept. 1993, did install a third muffler which did, indeed, substantially reduce the exhaust noise of the engine even if it did nothing to alleviate the mechanical noise of the engine and pump.

4. Also, when Judge Riley ordered consolidation of all of plaintiff's successive actions that he could, and closed the Arizona Courts to this plaintiff, he attempted to convert a continuing nuisance into a "permanent" nuisance (where only one suit can be filed), so that the defendants would acquire an "easement" to continue their noise upon the payment of no more than $1.00 in damages. Also, by closing the

courts to this plaintiff, while at the same time, permitting the defendants to continue their noise, unchallenged, Judge Riley deliberately and intentionally granted the defendants a "license" to continue their wrongdoing."

6. In the memorandum decision of Div. 2 of the Arizona Court of Appeals (filed Sept. 28, 1995), on page 4.:

"Willbanks asserts that the trial court "closed the Arizona courts to this plaintiff" when it consolidated his successive actions for trial. Since all Willbanks' claims involve the same legal issue: whether the noise from the pump engine constituted a nuisance, and most, if not all, the same evidence would be relevant and admissible as to each claim, we can see no abuse of discretion in consolidating the claims, as clearly permitted by Ariz. R. Civ. P. 42(a), 16 A.R.S. Furthermore, Willbanks has demonstrated no prejudice. We note that the court gave the jury separate forms of verdict for the different time frames alleged in Willbanks' various complaints."

1. Petitioner's "Motion to vacate the orders of Div. 3 of the Superior Court of Cochise County dated Aug. 9, 1993, and September 15, 1993.", pages 1 & 2.:

"Comes now plaintiff Pro Se, Dan Willbanks, and moves this court, pursuant to Rule 42, Ariz. R. Civ. P.; the Constitution of the United States; the Constitution of Arizona, to vacate the orders of the Hon. James L. Riley issued on August 9, 1993, and September 15, 1993, on the grounds and for the reasons that these orders are contrary to the existing law that pertains to a

private nuisance of a continuing, temporary, abatable nuisance between private owners; that these orders violate the U.S. Constitution, Article IV, Sections 1 & 2, and amendments 1, 5, 7, & 14; that these orders violate the Arizona Constitution, Article II, Sections 4, 13, 17, & 23, and Article 18, Section 6; that Judge Riley's order of September 15, 1993, interfered with a case over which Judge Riley had no jurisdiction; that these orders protected the defendants in their continuance of their nuisance; continuance of their taking or damaging plaintiff's private property without any compensation; continuance of their conversion of plaintiff's private property to their own private use; that these orders permit the defendants to continue their wrongdoing, indefinitely, under color of law, at the same time refusing to permit plaintiff to challenge, in court, the wrongdoing of the defendants; that these orders resulted from the prejudice of the court, and a desire of the court to protect these defendants, and their attorney.

This motion is supported by the attached statement of facts, and the attached memorandum of points and authorities."

2. Authorities cited in said memorandum of points and authorities:

(1) City of Phoenix v. Johnson, 51 Ariz. 115, 75 P. 2d 30 (quoted from below).

(2) City of Tucson v. Apache Motors, 74 Ariz. 98, 245 P. 2d 255 (quoted from below).

(3) Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 137 U.S. 568, 11 S.

Ct. 185, 34 L. Ed. 784 (quoted from below).

(4) Reynolds Metals Co. v. Wand (9 Cir.), 308 F. 2d 504 (quoted from below).

(5) Trinity Portland Cement Co. v. Horton (Tex.), 214 S.W. 510 (quoted from below).

(6) Baker v. Burbank-Glendale-Pasadena Airport, 39 Cal. 3d 862, 218 Cal. Rptr. 293, 705 P. 2d 866 (quoted from below).

(7) State Ex Rel., Etc. v. Sergent, Hauskins & Beckwith, 27 Ariz. App. 469, 556 P. 2d 23 (Theory that new cause of action arises upon occurrence of each new injury is peculiar to the law of continuing nuisances).

(8) Consolidated Chemical Industries v. White, 227 Ark. 177, 297 S.W. 2d 101 (may be as many successive recoveries as there are successive injuries).

(9) Daigle v. Continental Oil Co., 277 F. Supp. 875 (If cause of injury is continuous, it gives right to successive damages from day to day).

(10) Wagner v. Burlington Industries, Inc., 47 F.R.D. 146 (Wrong cannot be licensed, permitting a wrongdoer to appropriate to its own use the property of another).

(11) Patrick v. Sharon Steel Corp., 549 F. Supp. 1259 (Must bring successive suits to recover damage as they are incurred).

(12) Miller v. Cudahy Co., 592 F. Supp. 976 (Continuing nuisance gives rise, over and over again, to actions to recover for injuries sustained in statutory period immediately preceding filing of suit).

(13) Bolin v. Cessna Aircraft Co., 759 F. Supp. 692 (If nuisance is continuous, new cause of action accrues with each new injury).

(14) Hill v. McBurney Oil & Fertilizer Co. (Ga.), 38 S.E. 42 (To recover damages for continuing nuisance, multiplicity of suits necessary; action may be brought every day).

(15) Admiral Builders v. Robert Hall Village, 56 Ill. Dec. 627, 427 N.E. 2d 1032 (Each continuance is fresh nuisance and creates a cause of action).

(16) Ryan v. City of Emmetsburg (Iowa), 4 N.W. 2d 435 (Suit dismissed because nuisance was continuing; plaintiff sued for permanent damage).

(17) Clawson v. Garrison (Kan.), 592 P. 2d 117 (Successive injuries give rise to separate and distinct causes of action).

(18) Fergerson v. Utilities Elkhorn Coal Co. (Ky.), 313 S.W. 2d 395 (If nuisance is temporary, successive actions may be maintained).

(19) DeVoke v. Yazoo & M.V.R. Co., 211 La. 729, 30 S. 2d 816 (Continuous nuisance gives rise to successive damages from day to day).

(20) Dorman v. Ames, 12 Minn. Rep. 451 (Every continuance is a fresh nuisance, for which an action may be maintained).

(21) Cacioppo v. Southwestern Bell Tel. Co. (Mo.), 550 S.W. 2d 919 (Successive actions may be brought for continuation of nuisance).

(22) Haugen Trust v. Warner, 204 Mont. 508, 665 P. 2d 1132 (Plaintiff had cause of action each day nuisance continued).

(23) Sundell v. Town of New London, 119 N.H. 839, 409 A. 2d 1315 (Can recover only for past damage; must bring successive actions; proof of nuisance is proof of inverse condemnation).

(24) Valdez v. Mountain Bell Telephone Co., 107 N.M. 236, 755 P. 2d 80 (Can recover only past damage; may be as many

successive actions as there are successive injuries; new and separate cause of action arises with each new injury).

(25) Campbell v. Seaman, 63 N.Y. 568, 20 Am. Rep. 567 (Each continuance of nuisance is new cause of action).

(26) Amax, Inc. v. Sohio Indus. Products Co., 469 N.Y.S. 2d 282 (Continuing nuisance gives rise to successive actions).

(27) Webb v. Va.-Carolina Chemical Co., (N.C.), 87 S.E. 633 (Suit dismissed; nuisance was continuing & plaintiff sought permanent damages; plaintiff must file successive actions; each instant nuisance is continued is fresh ground of action).

(28) Lea Co. v. N.C. Brd. of Transp., 308 N.C. 603, 304 S.E. 2d 164 (May bring separate action for further taking).

(29) Evans v. Reading Chemical & Fertilizing Co., 160 Pa. 209, 28 A. 702 (Injury is continuous; remedy at law could not be made effective except by a multiplicity of suits).

(30) Conestee Mills v. Greenville, 160 S.C. 10, 158 S.E. 113, 75 A.L.R. 519 (Every day's continuance renders defendant liable to suit for injuries caused).

(31) Parsons v. Uvalde Electric Light Co. (Tex.), 163 S.W. 1 (may be as many successive injuries; recovery might be had at every term of the court).

(32) Gossner v. Utah P. & L., (Utah), 612 P. 2d 337 (May be successive actions for successive injuries; rule of strict liability is appropriate).

(33) Lambier v. City of Kennewick, (Wash) 783 P. 2d 596 (New cause of action arises with each new injury).

(34) Severt v. Beckley Coal, Inc. (W.

Va.) 170 S. E. 2d 577 (Actions may be maintained from time to time as long as cause of injury continues).

(35) Atty-Gen. v. Birmingham, 4 Kay & J. 528, 70 Eng. Reprint 220 (If injury is continuous, plaintiff would be obliged to bring series of actions, one every day of his life, for every additional injury).

The remainder of petitioner's "Motion to Vacate" was devoted to:

(1) Nuisances as inverse condemnation, pages 33 to 40;

(2) Jury trial - pages 40 to 47;

(3) Access to courts & "equal" access to courts - pages 47 to 56.

Both Brown and the Court of Appeals ignored these issues, addressing only the issue of consolidation of the cases.

THIRD QUESTION PRESENTED

"Have the respondent been given a "noise easement", under color of state law, in violation of the fifth and fourteenth amendments to the U.S. Constitution?"

1. U.S. Constitution, Amendment 5.:
   "No person shall---be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
2. U.S. Constitution, Amendment 14 (1).:
   "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Az. Constitution, Art. 2, Sec 4.:
"No person shall be deprived of life, liberty, or property without due process of law."

4. Az. Constitution, Art. 2, Sec. 17.:
"---. No private property shall be taken or damaged for public or private use without just compensation having first been made, ---, which compensation shall be ascertained by a jury, ---."

5. Az. Constitution, Art. 4, Part 2, Sec. 19, Par. 6.:
"No local or special laws shall be enacted in any of the following cases, that is to say:
6. Limitation of civil actions or giving effect to informal or invalid deeds."

6. Az. Constitution, Art. 4, Part 2, Sec. 19, Par 13.:
"No local or special laws shall be enacted in any of the following cases, that is to say:
13. Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises."

Rule 14 (1)(g)(i) - Third Question Presented

1. In the reporter's transcript of Aug. 9, 1993, line 25 on page 15 thru line 6 on page 16; petitioner speaking:
"Now, if the court consolidates and rules that I can't file anymore, they are maintaining the nuisance, taking

their noise easement under color of law.

Now, that kicks in the fifth and fourteenth amendments to the U.S. Constitution, and it starts the old Civil Rights Act, 42 U.S. Code 1983, jurisdiction would be laid in 28 U.S. Code 1343."

2. In the reporter's transcript of Aug. 9, 1993, page 20, lines 1 thru 7; Judge Riley speaking:

"You said a lot of things in your argument that are just legally wrong. Just as a quick example, you alluded to the fact that the fifth and fourteenth amendments will come into play. You have to understand those amendments prohibit the government taking the property without due process of law. They don't apply to private corporations in nuisance suits."

3. Petitioner's "Motion to vacate the orders of Div. 3 of the Superior Court of Cochise County dated Aug. 9, 1993, and September 15, 1993.", pages 1 & 2.:

"Comes now plaintiff Pro Se, Dan Willbanks, and moves this court, pursuant to Rule 42, Ariz. R. Civ. P.; the Constitution of the United States; the Constitution of Arizona, to vacate the orders of the Hon. James L. Riley issued on August 9, 1993, and September 15, 1993, on the grounds and for the reasons that these orders are contrary to the existing law that pertains to a private nuisance of a continuing, temporary, abatable nuisance between private owners; that these orders violate the U.S. Constitution, Article IV, Sections 1 & 2, and amendments 1, 5, 7, & 14; that these orders violate the Arizona Constitution, Article II, Sections 4, 13, 17, & 23, and Article

18, Section 6; that Judge Riley's order of September 15, 1993, interfered with a case over which Judge Riley had no jurisdiction; that these orders protected the defendants in their continuance of their nuisance; continuance of their taking or damaging plaintiff's private property without any compensation; continuance of their conversion of plaintiff's private property to their own private use; that these orders permit the defendants to continue their wrongdoing, indefinitely, under color of law, at the same time refusing to permit plaintiff to challenge, in court, the wrongdoing of the defendants; that these orders resulted from the prejudice of the court, and a desire of the court to protect these defendants, and their attorney, to the point of openly and notoriously joining the defendants and their attorney."

4. Judge Brown's reaction to petitioner's "Motion to Vacate" (in minute entry dated Nov. 3, 1994) was to declare the motion "spurious and without merit" and impose a sanction of $500.00 on petitioner for filing the motion.

5. Minute entry of Judge Brown, dated Dec. 15, 1994, 2nd Par.:

"Now, therefore, it is hereby ordered that the plaintiff is enjoined from filing any further lawsuits or litigation versus defendants until he has: a). paid the costs and sanctions and jury fees awarded herein, b). shown by affidavit that there has been a substantial change of circumstances with respect to defendant's use of the property to plaintiff's detriment, and c). plaintiff can show by certified copy duly attested on ownership

interest of the real property."

7. Petitioner's appeal brief (to Ct. of App.), page 18, Par. 34.:

"Will the injunction decreed by the Superior Court in the minute entry dated April 5, 1995 (see pages 157 & 158 in appendix of exhibits) against this plaintiff stand?"

8. Div. 2 of the Az. Ct. of App., in their decision dated Sept. 28, 1995, at page 2, simply stated that petitioner's claim of "inverse condemnation" did not merit discussion.

9. In petitioner's motion for reconsideration (to Ct. of App.), at page 13.:

"---. Judge Brown has already stated that this plaintiff should move his residence so that the noise would not bother him. Judge Riley ordered the Clerk of the Court not to accept any more complaints against these defendants, from this plaintiff, and Judge Brown issued an injunction ordering this plaintiff not to file any more complaints against these defendants. These good judges, with the approval of this court, do seem determined to protect these defendants, and permit them to continue their noise indefinitely."

10. In petitioner's "Petition for Review by Supreme Court of Arizona", filed Oct. 31, 1995, at page 4, Par. 9.:

"In the case of a continuing, abatable, private nuisance between strictly private parties, can the courts of Arizona be closed to a plaintiff (by ordering the Clerk of the Court not to file any more of plaintiff's complaints) or by injunction (ordering the plaintiff not to file any more complaints) while, at the same time, acknowledging that the noise could be heard, 24 hours a day, in plaintiff's

home? Is this not the granting of a "noise easement" to the defendants?"

11. In petitioner's "Motion for Reconsideration" (to the Ct. of App.), filed on Oct. 5, 1995, on pages 5 & 6, Paragraph 15.:

"15. Again, Sec. 3-112 can be applied only to public nuisances, and only to suits (civil or criminal) by the state or it political subdivisions. The words of 3-112(a) "---unless the agricultural operation has a substantial adverse effect on the public health and safety." (emphasis added). Also, the words of 3-112(b): "--- and not adversely effecting the public health and safety." (emphasis added). Again, see Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 839; at 745, 1st Col., 2nd Par.; Richards v. Washington Terminal Co., 233 U.S. 546, 58 L. Ed. 1088, 34 S. Ct. 654, at 657, 1st Col., 1st Par.: and see Finlay v. Finlay (1993), 18 Kan. App. 2d 479, 856 P. 2d 183, at 188. 1st & 2nd Col., notes (5) & (6,7), (citing the Nebraska Supreme Court in Flansburgh v. Coffee (1985), 220 Neb. 381, 370 N.W. 2d 127), construing a statute identical to 3-112, and holding that any change in the nuisance negated the statute. Consider the words of the legislature:

"Article 2. Limitation on nuisance suits against agricultural operations". (emphasis added). And in the

Historical and Statutory notes.

"The legislature declares that agricultural operations conducted on farmland in urbanizing areas are often subject to nuisance lawsuits and that

> the litigation encourages and even forces the premature removal of the land from agricultural uses. In this act, it is the intent of the legislature to ensure that agricultural operations conducted on farmland be adequately protected from nuisance litigation." (emphasis added).

And further, consider the date of enactment. Immediately under Sec. 3-112, it states:

> "Added as Sec. 3-1061 by laws 1981, Ch. 168, Sec. 2. Renumbered as Sec. 3-112 by laws 1990, Ch. 374, Sec. 6, eff. January 1, 1991."

12. The Supreme Court of Arizona, on April 23, 1996, simply denied, without comment, petitioner's "Petition for Review".

FOURTH QUESTION PRESENTED

"Would the Due Process Clause of the Fourteenth Amendment be violated by: (1) Judge Brown's refusal to honor timely filed notices of change of judge, without hearing; (2) the imposition of heavy sanctions (payable to the court to be later disposed of by Judge Brown), immediately after the filing of notices of change of judge, without hearings?"

1. U.S. Constitution, Amendment 14(1);

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities or citizens of the Unites States; nor shall any state deprive any person of

life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Az. Constitution, Art. 2, Sec. 4.:

"No person shall be deprived of life, liberty, or property without due process of law."

3. Az. Constitution, Art. 6, Sec. 21.:

"Every matter submitted to a judge of the Superior Court for his decision shall be decided within sixty days from the date of submission thereof.---."

4. Rule 13, Az. Uniform Rules of Practice for the Superior Court.:

"Every matter submitted to a judge or commissioner shall be decided with all reasonable promptness and in any event, in accordance with Section 21, Article VI of the Arizona Constitution, not later than sixty days from the date of submission thereof."

5. Rule 2(c) of the local rules of practice for the Superior Court of Cochise County.:

"Motions shall be set for hearing on or after the tenth day of filing unless specifically directed otherwise by the court."

6. A.R.S. Sec. 12-409. Change of Judge: Grounds; Affidavit.:

"A. If either party to a civil action in a superior court files an affidavit alleging any of the grounds specified in subsection B, the judge shall at once transfer the action to another division of the court if there is more than one division, or shall request a judge of the superior court of another county to preside at the trial of the action..

B. Grounds which may be alleged as provided in subsection A for change of

judge are:

1.-------

2.-------

3.-------

4.-------

5. That the party filing the affidavit has cause to believe and does believe that on account of the bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial."

7. A.R.S. Sec. 12-410. Punishment for contempt for filing affidavit for change of judge prohibited.:

"No judge or court shall punish for contempt any one making, filing or presenting the affidavit provided for by Sec. 12-409, or any motion founded thereon."

8. Rule 42(f), Az. R. Civ. P. Change of judge.:

1. Change as a matter of right.

"(A) Nature of proceedings. In any action pending in Superior Court, ---, each side is entitled as a matter of right to a change of one judge---.

(B) Filing and service---.

(C) Time. Failure to file a timely notice precludes change of judge as a matter of right. A notice is timely if filed sixty (60) or more days before the date set for trial.---.

(D) Waiver. A party waives the right to change of judge as a matter or right when, after a judge is assigned to preside at trial or is otherwise permanently assigned to the action, the party agrees to the assignment or participates before that judge in:

(1) Any scheduled contested matter in the case; or

(11) A scheduled pretrial hearing

or conference; or

(111) The commencement of a trial. Such waiver is to apply only to such assigned judge.

(E)----------.

(F)----------.

2. Proceedings based on cause.

(A) Grounds. Grounds for proceedings based upon cause are stated in A.R.S. Sec. 12-409 and proceedings under that statute shall be governed by this rule.

(B)----------.

(C) Timeliness and waiver. An affidavit shall be timely if filed and served within twenty days after discovery that grounds exist for change of judge. No event occurring before such discovery shall constitute waiver of rights to change of judge based on cause.

(D) Hearing and assignment. The presiding judge shall forthwith provide for a hearing to determine the issues connected with the affidavit. The hearing judge shall decide the issues by the preponderance of the evidence and, following the hearing, shall return the matter to the presiding judge who shall as quickly as possible assign the action back to the original judge or make a new assignment, depending on the findings of the hearing judge.

---.

3. Duty of judge after filing of notice of affidavit. When a notice or an affidavit for change of judge is timely filed, the judge named in the notice or affidavit shall proceed no further in the action except to make such temporary orders as may be absolutely necessary to prevent

immediate and irreparable injury, loss or damage from occurring before the action can be transferred to another judge.---."

RULE 14(1)(g)(i) - FOURTH QUESTION PRESENTED

1. Minute entry of Judge Brown dated Nov. 3, 1994, bottom of page 2 & top of page 3.:

"Plaintiff filed peremptory notice of change of judge against this division on Oct. 7, 1994.

The court finds this notice untimely. It is ordered denied.

Plaintiff also filed notice of change of judge for cause against this division.

It is ordered that change of judge for cause is denied as untimely on its face."

2. In "Plaintiff's objection to and exception to, Judge Brown's ruling dated Nov. 3, 1994, - and request for reconsideration", in "Request for Reconsideration" (filed Nov. 14, 1994) on Page 2, Par. 3, thru Par. 4 on Page 3.:

"3. In Marsin v. Udall, 78 Ariz. 309, 279 P. 2d 721, it was held that the right to a fair and impartial trial before a fair and impartial judge is a "valuable substantive right"; that neither the Supreme Court not the Superior Court can by rule of procedure deprive a party of the opportunity to exercise the right to a fair and impartial trial before a fair and impartial judge; that any rule of court that operates to lessen or eliminate the right to a fair and impartial trial before a fair and impartial judge is of no legal force.

4. Plaintiff finds nothing in the statute (A.R.S. 12-409) putting a time limitation upon the filing of a Notice of Change of Judge for cause. In Hordyk v. Farley, 94 Ariz. 189, 382 P. 2d 668, at 670, middle of the 2nd col. (quoting from Stephens v. Stephens, 17 Ariz. 306, 152 P. 164): "For us to hold that the application, made one day before the date set for the trial, came too late, would be to disregard the statute (for it nowhere limits the time for making the application) and promulgate an arbitrary rule of the court's making; and if the court may say that the application came too late in this case, it could arbitrarily deny the change, if made two days or four days or ten days before the time set for trial, as being too late. This would be making the law and not construing it."

In Hickox v. Superior Court, 19 Ariz. App. 195, 505 P. 2d 1086:

"The granting of a peremptory challenge to obtain a Change of Judge is a matter of grace under Rules of Civil Procedure, Rule 42(f), and is to be distinguished from a disqualification of a judge based upon cause."

3. In the minute entry by Judge Brown dated Dec, 2, 1994, Page 1, 2nd Par.:

"It is further ordered that plaintiff's request that this court appoint a judge to hear his Notice of Change of Judge is denied. As this court has ruled previously, the Notices of Change of Judge were without merit and are without merit."

4. In petitioner's appeal brief, Page 11, Par. 2.:

"Does a judge have jurisdiction to proceed in a case after receiving a

timely-filed Notice of Change of Judge filed pursuant to the provisions of Rule 42(f)(1), ARCP; and a timely-filed Notice (and affidavit) of Change of Judge for Cause pursuant to the provisions of Rule 42(f)(2), ARCP, and A.R.S. 12-409?"

5. In petitioner's appeal brief, Page 23, 2nd Par.:

"It is Stare Decisis that a timely filed Notice of Change of Judge cannot be challenged (Hendrickson v. Superior Court, 85 Az. 10, 330 P. 2d 507, & State v. Neil, 102 Az. 110, 425 P. 2d 842); that it is only when the notice is not timely filed that it may be challenged, and then a hearing must be held (State v. Harwood, 110 Ariz. 375, 519 P. 2d 177); that the challenged judge cannot rule on a Notice of Change of Judge (State v. Garcia, 114 Ariz. 317, 560 P. 2d 1224); and that the right to a Change of Judge is waived only when it is filed after the judge is allowed to receive evidence. (State v. Carpenter, 1 Az. App. 522, 405 P. 2d 460, and Tash v. Saunders, 153 Ariz. 322, 736 P. 2d 805). Here, Judge Brown simply declared the notices to be "untimely", and refused to honor the Notices of Change of Judge."

6. Opinion of Div. 2 of the Az. Ct. of App., filed Sept. 28, 1995, Pages 4 & 5.:

"Willbanks also challenges the Trial Court's denial of his motion for Change of Judge for Cause. Ariz. R. Civ. P. 42(f)(2), 16 A.R.S. The Trial Court correctly determined that Willbanks' motion, which was based on events that occurred on March 7, 1994, was untimely filed on October 7, 1994. See Ariz. R. Civ. P. 42 (f)(2)(c) (Motion must be

made within twenty days after discovery of grounds for cause). Willbanks further asserts that the court erred in denying his Motion for Change of Judge as of right under Ariz. R. Civ. P. 42(f)(1). However, Willbanks waived this claim when the matter went to trial before the judge he wished to remove. Ariz. R. Civ. P. 42(f)(1)(d); Hickox v. Superior Court, 19 Ariz. App. 195, 505 P. 2d 1086 (1973) (Proper method of appealing denial of peremptory challenge of judge is special action." (emphasis added).

7. Minute entry of Judge Brown, dated March 7, 1994, Page 1.:

"No. CV93-08-00443
Minute Entry Re:
Firm Trial Date:
Assigned to Judge:
Michael J. Brown
(Page 1 of 3)

It is hereby ordered setting a jury trial date of:

December 6, 1994, at 10:00 a.m.

Estimated time of trial: 2 days."

8. Petitioner's motion for reconsideration, filed with the Ct. of App., at Page 2.:

"* * Change of Judge * *

3. In plaintiff's "Affidavit of Grounds for Change of Judge", filed Oct. 7, 1994 (Index #119), at Page 4, Par. 10, we find:

"This plaintiff's cases have been assigned to the honorable Michael J. Brown since October 1, 1993. During this time (a year), Judge Brown has refused to afford a hearing on the motions that were pending when plaintiff's cases were assigned to Judge Brown, or the motions that have been filed since these cases were assigned

to Judge Brown."

4. The thrust of plaintiff's cause for filing Change of Judge notices is clearly Judge Brown's refusal to afford a hearing of any kind.

5. Plaintiff's last filing prior to Oct. 7, 1994, was on Sept. 9, 1994. Plaintiff's Motion for Sanctions, and application for order to show cause, was filed on Aug. 18, 1994. Allowing the judge his 60 days to hear and determine the matters before him, plaintiff's Notice of Change of Judge was timely.

6. As for filing a "Special Action", neither Judge Brown's minute entry of Nov. 3, 1994, nor his minute entry of Dec. 2, 1994 (rec'd by plaintiff on Dec. 5, 1994) (denying plaintiff's Motion for Reconsideration) were signed. Plaintiff has just been "burned" by this court for bringing a special action against Judge Riley based on an "unsigned" minute entry.

7. As for "waiving" his Motion for Change of Judge as of right, consider that plaintiff received Judge Brown's denial of the Motion for Reconsideration on Dec. 5, 1994. The trial was on Dec. 6, 1994. There was no "final order" on which to base a special action. Judge Brown had just laid heavy sanctions on this plaintiff and would have certainly imposed heavier sanctions had plaintiff refused to go to trial. Plaintiff had no choice but to go to trial and then bring the matters to this court on appeal. Plaintiff did not voluntary "waive" his Notice of Change of Judge."

9. On Oct. 20, 1995, the Ct. of App. simply denied petitioner's Motion for Reconsideration.

10. In petitioner's "Petition for Review by Supreme Court of Arizona", bottom of Page 14, and Page 15.:

"1. Notice of Change for Judge. Plaintiff argued this issue on pages 22 & 23 of his appeal brief; cited (and quoted from) authorities in Appendix #2, Pages 5 through 11, and Appendix #20, Pages 81 & 82, of his Appendix of Authorities filed with his brief; re-argued the "timeliness" of the notices on page 2 of his "Motion for Reconsideration" (to the Court of Appeals); all of which are placed first in the appendix filed with this petition.

Plaintiff did not "waive" anything, for the reason that there was nothing to "waive". Plaintiff's notices were timely filed on October 7, 1994 (at that time, Judge Brown had heard nothing); therefore, Judge Brown had no jurisdiction to proceed further. Nothing this plaintiff could do, short of filing a Motion to Vacate his Notices of Change of Judge (and such motion must be concurred with by the defendants), could restore jurisdiction to Judge Brown.

The Court of Appeals seems to think that this plaintiff should have refused to go to trial before Judge Brown. Heavy Sanctions had already been imposed on this plaintiff by Judge Brown immediately after the filing of the notices; if plaintiff had refused to go to trial, further sanctions were a certainty; and a very real possibility of being thrown in jail for "contempt of court". Plaintiff could not "waive" jurisdiction where Judge Brown had no jurisdiction. This court can take notice that Judge Brown decided the matter all by himself and no hearing

was held as mandated by ARCP 42(f)(2)(d)."

11. The Arizona Supreme Court, on April 23, 1996, simply denied, without comment, petitioner's "Petition for Review".

JURY INSTRUCTIONS

1. Prosser & Keeton, Torts (5th Ed.), Ch. 15, Sec. 88b, P. 635, 2nd Col., 2nd Par.:

> "The prevailing rule is that in the absence of a prescriptive right, the defendant cannot condemn the surrounding premises to ensure his operation, and that the purchaser is entitled to a reasonable use and enjoyment of his land to the same extent as any other owner, so long as he buys in good faith and not for the sole purpose of a vexatious lawsuit."

2. Restatement of Torts (2d) Sec. 930, last Par. of "Comment on Subsection (2)", Page 550.:

> "If the plaintiff sues for an injunction against an enterprise engaged in public service, it is for the court to determine whether, upon a balance of individual and public interests, the specific relief should be granted with compensation for past harms or denied and complete compensation awarded for past and future invasions."

3. 40 A.L.R. 3rd 601 (Annotation - Modern Status of Rules as to balance of conveniences or social utility as affecting relief from nuisance), at 610, 1st Col., 2nd Par.:

> "An injunction will be granted to restrain a willful, wanton, or unprovoked wrong although the loss to the defendant will be greater than the injury to his adversary from its refu-

sal, the courts taking the view that no balancing of the conveniences of private parties will be indulged where the act complained of is tortious in itself as well as in its incidents, and where the preservation of a clear right is involved. In such cases, it has been said that the wrongdoer is not entitled to the benefit of any consideration in a court of equity and that the defendant should not be allowed to argue that injury would result from the injunction, for no man can complain that he is injured by being prevented from doing, to the hurt of another, that which he has no right to do."

4. U.S. Constitution, Amendment 14(1):

"---; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. In the reporter's transcript of Dec. 7, 1994, at Page 39, Lines 5 thru 14; Judge Brown speaking:

"Ladies and gentlemen, in order for you to award damages in this case, there must be some evidence of damages to plaintiff's real property. There has been no such evidence admitted during this trial. Therefore, you will not be able to award damages with your verdict. However, the object of a jury trial is to resolve disputes between your fellow citizens. I believe that you will still be able to do that with your verdict, notwithstanding the lack of evidence with respect to damages."

6. In the reporter's transcript of Dec. 6, 1994, at page 136, Lines 11 thru 15.:

"Mr. Willbanks: it is not the value of the property that I'm suing for. It is the disruption of my use, and use

of property, peaceful and quiet. Any damage to the land would be temporary, so you cannot figure that."

7. In the reporter's transcript of Dec. 6, 1994, at page 141, Lines 17-19.:

"Mr. Willbanks: And, your honor, the right to the peaceful and quiet use of the property is property."

8. Written jury instruction #11.:

"A private nuisance is an unreasonable interference with a person's interest in the use and enjoyment of the person's real property." (Emphasis added).

9. Written jury instruction #12.:

"Every property owner is entitled to the peaceful enjoyment of his property free from the unreasonable interference of others." (Emphasis added).

10. A.R.S. Sec. 13-2917(a):

"Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons,------ is a public nuisance,----." (Emphasis added).

11. Written jury instruction #13.:

"The rules of a civilized society require us to tolerate our neighbors, the law requests our neighbors to keep their activities within the limits of what is tolerable by a reasonable person. What is reasonably tolerable must be tolerated; not all interferences with a person's rights are private nuisances.

The law does not concern itself with trifles, or seek to remedy all the petty annoyances and disturbances of

everyday life in a civilized community even from conduct committed with knowledge that annoyance and inconvenience will result. In order to constitute a nuisance, the complained-of-interference must be substantial, intentional and unreasonable under all the circumstances." (Emphasis added).

12. Written jury instruction #14.:

"Factors to be considered-Jury Instruction

In determining whether an act or acts constitute a nuisance, all of the facts and circumstances surrounding it should be considered in determining the reasonableness of the defendant's activities, including such factors as:

a. The locality and character of the surroundings,

b. The nature of the defendant's business and the manner in which it is conducted,

c. The value to the community of the defendant's activities,

d. The defendant's ability to reduce the harm,

e. The priority of use of the property(s).

However, none of these factors standing alone, should be considered determinative.

McQuade v. Tucson Tiller Apartments, Ltd., 25 Ariz. App. 312, 543 P. 2d 150 (1975)."

13. Written jury instruction #15.:

"You are instructed that the Arizona Revised Statutes provides as follows:

A. Agricultural operations conducted on farmland that are consistent with good practices and established prior to surrounding nonagricultural uses are presumed to be reasonable and do not constitute a nuisance unless the agri-

cultural operations has a substantial adverse effect on the public health and safety.

B. Agricultural operations undertaken in conformity with federal, state and local laws and regulations are presumed to be good agricultural practice and not adversely affecting the public health and safety.

LAST CONTROVERSY - STANDING TO SUE

1. In the reporter's transcript of Dec. 7, 1994, at Page 60, Lines 12 thru 17.:

"Mr. Willbanks: Okay, I'll make a motion for mistrial one more time for the record.

The Court: Thank you, Mr. Willbanks. The record will show that the motion is denied.

The record may also show that you do not have standing to make the motion."

2. Decision of the Court of Appeals, Page 10, next to last Paragraph of the decision.:

"Consequently, we do not reach this issue."

3. The Arizona Supreme Court, on April 23, 1996, simply denied, without comment, petitioner's "Petition for Review".

4. Amendment 14 to the U.S. Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

5. Az. Const., Art. 4, Part 2, Sec. 19, Par. 13.:

"No local or special laws shall be enacted in any of the following cases, that is to say:

13. Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises."

RULE 14(1)(g)(i) - FIFTH QUESTION PRESENTED

1. In the reporter's transcript of the hearing before Judge Riley on Aug. 9, 1993, at Page 39, Lines 5 thru 14.:

"Mr. Allred: Your honor, two things. One is that I have made, in my motions, a claim for attorney's fees and costs, and that should be continuing. And, I want to make that a matter of record this morning, just because I intend to pursue that, make sure that we have those kinds of orders, if the court is willing to give them to us.

The Court: That would have to be as a matter of sanctions in a nuisance case, I can't order attorney's fees as a prevailing party matter, but I will certainly keep that in mind as I determine sanctions."

And further, at Page 40, Lines 14 to 17.:

"The Court: Mr. Willbanks, I think we all operate on the same assumption, and that is in a nuisance case, which is a Tort Action, I can not grant attorney's fees to the prevailing part."

2. In petitioner's appeal brief (to Div. 2 of the Ariz. Ct. of App.), at Page 18,

Par. 33.:

"Are the defendants entitled to costs of $341.00, and attorney fees of $25,107.00 in this case? See Appendix #24, Page 91, in "Appendix of Authorities."

3. In Appendix #24, Page 91, of petitioner's Appendix of Authorities (Filed with petitioner's appeal brief):

"Employer was not entitled to recover attorney's fees with regard to employee's assault and battery, negligent and intentional infliction of emotional distress claims against employer, which were based upon vicarious liability through doctrine of respondeat superior, as they were solely tort claims." Smith v. American Exp. Travel Related Services, Co. Inc. (Az. App. Div. 1, 1994), 876 P. 2d 1166."

"2. Fire Insurer's subrogation action against subcontractor arose out of potential tort claim between lender and subcontractor for property damaged in fire due to subcontractor's negligence, and not out of insurance contract, and thus, subcontractor was successful party on appeal, where lender had no contractual relationship with subcontractor." Fire Ins. Exchange v. Thunderbird Masonry, Inc. (1993), 177 Ariz. 365, 868 P. 2d 948."

4. The only mention of this matter (by Div. 2 of the Ct. of App.) was on Page 4 of their memorandum decision where the court noted: "The court awarded costs and attorney's fees to Alamo and Keck." The App. Ct. simply ignored the issue.

5. In petitioner's "Petition for Review by Supreme Court of Arizona", at Page 4, Par. 11.:

"This court should also take a close look at the imposition of sanctions

(imposed immediately after the filing of Notices of Change of Judge); and the granting of costs and attorney fees in tort actions for damages."

And further, at Page 17, Par. 5.:

"5. Costs and Attorney Fees. Judge Brown granted costs and attorney's fees of over $25,000.00 to the defendants; but, since both of plaintiff's Notices of Change of Judge were timely filed, Judge Brown was completely without jurisdiction to do anything. Also, 5 of plaintiff's actions were strictly Tort Actions for Damages. Consider:

"Employer was not entitled to recover attorney's fees with regard to employee's assault and battery, negligent and intentional infliction of emotional distress claims against employer, which were based upon vicarious liability through doctrine of respondeat superior, as they were solely Tort claims." Smith v. American Exp. Travel Related Services Co., Inc. (Az. App. Div. 1, 1994), 876 P. 2d 1166."

Fire Insurer's Subrogation Action against subcontractor arose out of potential Tort Claim between lender and subcontractor for property damaged in fire due to subcontractor's negligence, and not out of insurance contract, and thus, subcontractor was not entitled to attorney fees pursuant to statute, even though subcontractor was successful party on appeal, where lender had no contractual relationship with subcontractor." Fire Ins. Exchange v. Thunderbird Masonry, Inc. (1993), 177 Ariz. 365, 868 P. 2d 948."

"Unless provided for by statute, expenditures made by parties in civil proceedings are not recoverable as costs." Sweiss v. Chatwin, 120 Ariz.

249, 585 P. 2d 269."

"The Court of Appeals, however, let the award of costs and attorney fees stand. Also, the Court od Appeals granted costs and attorney fees, to the defendants, on appeal. Plaintiff's appeal was not frivolous."

6. On April 23, 1996, the Arizona Supreme Court denied petitioner's "Petition for Review" without comment.

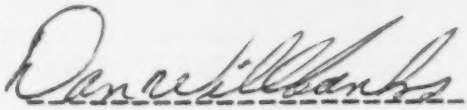
7. Minute entry of Judge Brown, dated January 5, 1995.:

"It is ordered that the defendant file an affidavit of attorney's fees and costs."

8. Minute entry of Judge Brown, dated April 5, 1995, Page 1, 3rd Par.:

"It is further ordered that the defendant have judgement against the plaintiff for attorney's fees in the amount of $25,107.00, in addition to the judgement for costs entered earlier in the amount of $341.00."

SUBMITTED BY:



DAN WILLBANKS, PRO SE
5158 W. BUFORD LN.
McNeal, Az. 85617
(520) 642-3746